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Exhibit No. 1.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, 58

vs.

THE BRITISH STEAMSHIP "LISBONENSE."

ROBERT SINGLEHURST, *et al*,
Cross-Libellants,

vs.

"LA COMPAGNIE GENERALE TRANSATLANTIQUE," 59
Respondents.

EDWARD K. JONES, for *Compagnie Generale & La Champagne.*
SIDNEY CHUBB, for the "*Lisbonense.*"

BROWN, J. At about half past 5 on the morning of December
7, 1890, a little before day-break, the libellants' steamship,
La Champagne, outward bound on one of her regular trips from 60
New York to Havre, came in collision with the British steamship,
Lisbonense, inward bound, a little outside of Sandy Hook,
and very near the point where the track of the main ship
channel intersects the axis of the swash and south channels.
The stem of *La Champagne* struck the port quarter of the *Lisbonense*
about 20 feet from her stern, penetrating about 2 feet,
cutting her down nearly to the water's edge, and tearing off
her plates aft, while the stem of *La Champagne*, and a number
of plates from her port bow were carried away and left stick-

61 ing fast in the side of the *Lisbonense*. Each charges the fault
upon the other, and the above cross-libels were filed to recover
their respective damages.

La Champagne is a steamer of the first-class, 504 feet long,
of about 10,000 tons displacement, and drawing at the time of
collision 25½ feet. The *Lisbonense* was 270 feet long, of about
tons burden, and drew 19½ feet. The former, on account
of her deep draft, was necessarily proceeding out around the
Southwest Spit, by way of the main ship channel, and Gedney's
channel; the latter was coming in by way of the south channel
and the swash, the axis of which crosses the main ship channel
at an angle on the S. W. side of 10¾ points. At the time of
62 collision the night was clear, but dark; the tide had been running ebb two hours; the wind was fresh from the north-west.
La Champagne after leaving her dock the previous day had
been detained by fog near Quarantine until about half past 4
A. M. of the 7th, when she got under way and passed the meridian of the Sandy Hook lights at 5.20 A. M. At that time she
burned her private signal torches, and soon after burned a blue
light for the pilot boat outside to be in readiness to receive her
pilot. These signals, as well as her green and white lights,
were observed by the *Lisbonense*, which was then on the usual
course up the south channel about N. W. 3-8 N. The red light
of the *Lisbonense* was seen by *La Champagne* at about the
63 same time, bearing 23 degrees, as indicated by the alidade, on
her starboard bow. This would make the two vessels about
two miles apart at that time, and *La Champagne* about 1½
miles, and the *Lisbonense* about one mile, from the point of collision. The speed of the former derived from her engines was
about 10½ knots; of the latter, as stated by the master to the
pilot when he came aboard, nine knots. Making corrections
for the tide, which according to the coast survey reports would
run at the rate of about 1.75 knots at that time, and which
soon after passing Sandy Hook ran about 3½ points to starboard
of the course of *La Champagne*, and about two points off the
port bow of the *Lisbonense*, and allowing something for the
64 fresh north-west wind, *La Champagne* would be making a little less than 12 knots over the ground, and the *Lisbonense* a
little less than 7½ knots. These conclusions as to speed harmonize with the other facts of the collision, and with the bearings
as testified to by Captain Boyer, and they so far confirm his
narrative; they are not compatible, however, with the estimate
of several of the witnesses for the *Lisbonense*, that *La Champagne* bore about 4 or 4½ points off her port bow after she
had steadied up the south channel, and her bearing, until col-

lision was near, could not have been more than from 3 to 3½ 65
points off the port bow of the *Lisbonense*.

Captain Boyer, of *La Champagne*, upon sighting the *Lisbonense* observed her carefully with the alidade to see whether her bearing changed or not in reference to the necessity of taking precautions against collision. After observing her a short time, not seeing any material change in her bearing, he informed the pilot, who replied that the *Lisbonense* would give way. Soon after, still seeing no change of bearing, and when the pilot was about to give a signal of two whistles to the *Lisbonense*, signifying that he would go to the left and ahead of her: he received a signal of one whistle from the *Lisbonense*, which
was immediately answered by one whistle from *La Cham-* 66
pagne. There are no means of determining the precise time when these signals were exchanged, or the exact distance the two vessels were then apart. Most of the witnesses for the *Lisbonense* estimate the distance as about a mile, and I see no reason to believe it no less than ¾ of a mile. *La Champagne* ported her helm so as to change her heading about one-quarter of a point to starboard, which was all that was safe for her in that channel, in an ebb tide and northwest wind. The *Lisbonense* ported so as to change her heading half a point, or a point only, whereupon she steadied her helm upon the proper course to go up the swash channel, and there-
by resumed substantially the same course she was on before. 67
Captain Boyer, after carefully continuing to watch the *Lisbonense*, and judging further manoeuvres necessary, stopped his engines, and a few seconds afterwards reversed at full speed, repeating the order "back as strong as possible," and at the same time gave the *Lisbonense* a signal of 3 whistles, which announced his reversal to the *Lisbonense*, and soon after repeated the same signal. The *Lisbonense* was all the time going at full speed, and she continued at full speed until collision.

Upon the testimony of the *Lisbonense* alone there would be much uncertainty and inconsistency as to the time when these
signals were given, or were heard by her, as well as to what 68
was done by her. The master and others of her witnesses say that when those signals were heard, *La Champagne* bore abeam of her and was only about 100 feet off. Her pilot at first said (page 121) that when he heard the blast of 3 whistles she bore "fully 4½ points on the port bow, may be 5." Afterwards he says "she was pretty near right angles, very nearly abeam, 100 feet away" (page 129). Her other witnesses say the same. But this is so clearly erroneous

69 as much to discredit these witnesses on other controverted points. The fact that the *Lisbonense* was penetrated only about 2 feet (the pilot says 15 feet), with her great momentum (10,000 tons), is proof to my mind that her rate of motion at the moment of collision could not have exceeded 2 knots (*The Martello*, 34 Fed. Rep., 71, 73), though the master in his computations assumes over 3 knots. At that moment both were subject to about the same effects from the tide, which in that respect is therefore disregarded. From the experiments made with *La Champagne*, as well as those made with similar vessels (*La Normandie*, 43 Fed. Rep., 159, 161), a reduction from 10 knots to 2 through the water (a half knot would be lost in
70 stopping 20 seconds) would have required at least 2 minutes time with the engine backing at a power of only 16 knots, and an advance of at least 1150 feet through the water, to which should be added 200 feet for difference of tideway between the two vessels.

When the three whistles of *La Champagne* were heard, the *Lisbonese* put her helm hard a port, and must have changed from three to four points, since the collision was at about right angles and *La Champagne* must have turned to starboard about 1½ points while reversing.

If, as her master says, *La Champagne* at collision was angling a little forward, the *Lisbonense* must have changed more
71 than four points. This, however, I think improbable. Her change of about four points to a right angle with the course of *La Champagne* agrees with the testimony of officer Dupont, who observed the heading of the *Lisbonense* at collision. In making this change to starboard, the *Lisbonense* must have gone at least 1000 feet, and probably more, so that the distance of the vessels apart when the three whistles of *La Champagne* were blown must have been from 1500 to 2000 feet. This makes probable the testimony of the master and pilot of the *Lisbonense*, who say that they had no apprehension of collision until these three blasts were heard. It is incredible that they could have had no fear of collision until *La Champagne* was
72 within 100 feet of them, as they allege; or if that were the case, that they should not have noticed her cabin lights, as they say they did not, to indicate an approach so near. The master also says he hard-a-ported when those whistles were heard, and had they not been heard till *La Champagne* was within 100 feet, the *Lisbonense* would not have swung a point to starboard before collision.

On the part of the *Lisbonense* it is claimed that in accordance with the ordinary rule of the road, *La Champagne*, having the

Lisbonense on her starboard hand, was bound, under Article 16 **73**
of the International Rules of 1885, to keep out of the way.

For *La Champagne* it is contended (1) that it was the duty of the *Lisbonense* to give way under Article 23 in the present case, because the navigation of *La Champagne*, on account of her great draft, was hemmed in by winding channel ways, and by shoals which would not admit of the application of the rule for the open sea; that these difficulties were increased by a strong ebb tide and a fresh northwest wind, in consequence of which it was impossible for *La Champagne* to keep out of the way of the *Lisbonense* by going to starboard without the certainty of running upon shoals before she could recover the
channel; while the much smaller draft of the *Lisbonense* per- **74**
mitted her to go in any direction without hindrance; and that it was, therefore, the duty of the *Lisbonense* to suffer *La Champagne* to pursue her course on the same principle on which a boat descending with the tide an obstructed channel way or river, has the right of way as respects an ascending vessel, because the latter can perfectly control her movements, while the other cannot. The *Galatea*, 92 U. S. 439; Marsden on Col. 2d Ed. 59; (2) that without regard to the foregoing, the *Lisbonense* after giving a signal of one whistle, under Article 19, was bound by the express command of that Article to continue her course to starboard, and that it was her failure to do so that
produced the collision. **75**

Upon the construction which seems to me necessary of the present Rules of navigation, I find the last contention of *La Champagne* well founded. Article 19 says that "a steamship may indicate her course to any other ship which she has in sight by the following signals of her steam whistle, namely; one short blast to mean, I am directing my course to starboard; two short blasts to mean, I am directing my course to port; three short blasts to mean, I am going full speed astern. The use of these signals is optional; but if they are used, the course of the ship must be in accordance with the signal made." The meaning of the last clause seems to me unmistakable. It is not com-
plied with by navigating in the prescribed direction at the **76**
moment of giving the signal, and then changing it the next moment, or the next. The purpose of the signal is to apprise the other vessel of some manoeuvre the former is making, and to let the other know what she may or must count upon. The obligation, therefore, is not a mere momentary one. How long a port wheel must be continued in such a case it is not necessary to consider; but the rule requires at least some substantial change of direction to be made and preserved, provided the

77 circumstances of the navigation present no obstacle thereto, until the danger is over, or some new manoeuvre becomes necessary. On any other construction the signal would be virtually a false signal and a snare; since the other vessel could never tell for how long or how short a time the signalling vessel would continue to act in accordance with her signal, nor upon what to count.

In the present case the only change of course to starboard in accordance with the signal claimed to have been made by the *Lisbonense*, is "from half a point to a point," which was accomplished in going some 200 or 300 feet, when the vessels were three-fourths of a mile apart. The
78 *Lisbonense* then resumed substantially her former course; There was nothing in the circumstances of her navigation to compel her to do so. The swash channel was nearly a mile and a half distant; and there were no obstructions to prevent her going to starboard *ad libitum* in accordance with her signal. But in fact no substantial change of her course to starboard was made. She had been for some time previously heading up the swash channel course; and after going "a half point or a point" to starboard, she again headed up the swash channel course as before. The change in her position effected by her slight porting was perhaps 25 feet, more or less, to the eastward, and then her former heading was resumed, only a
79 trifle more to the westward even than before.

Such a resumption of her former course substantially after going to starboard "a half point or a point," was not only a violation of the obligation of Article 19, but a violation of Article 22 also; because it changed her course a half point or a point towards *La Champagne*, after she had once effected at least so much change away from her. The least she could do under Articles 19 and 22 was to preserve unchanged such a direction to starboard as she had already made under her signal. Her change of a half point or a point back towards *La Champagne*, which she must have made in order to head up the swash channel, was of itself far more than enough to produce the col-
80 lision; while a reasonable continuance of her port helm long enough to effect a substantial compliance with her signal and an adherence to the change of course thereby made, would have carried the *Lisbonense* still further to the eastward.

Assuming that the *Lisbonense* had the right of way, and that it was the duty of *La Champagne* to keep out of the way, Article 19, in my judgment, did not authorize her to take the initiative, or to give any signal at all to *La Champagne* at the time she did, when three-fourths of a mile away from her. She

had no such right until constrained to change her course. That 81
article authorizes signals only on "taking any cause authorized or required by the regulations." But the regulations do not authorize any change of course by crossing vessels, except by the vessel bound to keep out of the way; the other must "keep her course" (Article 22). The system of signalling under Article 19 is essentially different in this respect from the system authorized and required by the rules of the Supervising Inspectors in rivers and harbors. The latter rules for the most part do not prescribe or always require any change of course; they are to indicate only on which side of the other the signalling vessel proposes to pass; they are compulsory; an answer is required that a common understand- 82
ing may be had; and the answer does not necessarily demand any change of helm; whether such a change is required or not depends on the circumstances. Under Article 19 no answer to another's signal is required or provided for. This signal is an announcement of a change of course to the right or to the left; it is optional; but if given, the corresponding change must be made.

It is said that the manœuvre of the *Lisbonense* only aided *La Champagne* in her duty of keeping out of the way. That would have been true had the obligation imposed on the *Lisbonense* by Article 19 been performed, and the manoeuvre adhered to; but the obligation being broken, 83
and the manoeuvre revoked, without notice, *La Champagne* was misled to her obvious prejudice. Instead of going off to starboard as her signal promised, the *Lisbonense*, after turning a trifle to starboard, came back on *La Champagne's* course, thus doubly deceiving her. The fault of the *Lisbonense* in this respect was the same as in the more common cases of an unexpected change of course across the other's bow. The *Roanoke*, 45 Fed. Rep., 905. The *Newport* and *Ives*, 44 Fed. Rep., 445.

Considering the claim of *La Champagne's* pilot that the practice of pilots was that vessels coming up the south channel should give way to the big ships going down with the ebb tide through the main channel, the initiative taken by the *Lisbonense* 84
without reason or necessity, and in violation of Article 22, if the ordinary rule were in operation, when at least three-fourths of a mile distant, afforded the pilot of *La Champagne* some ground for the supposition that the *Lisbonense* intended to waive the ordinary rule of the road in accordance with the practice as he claims to have understood it. But on the other hand, if such had been the intention of the *Lisbonense*, the more appropriate course would have been to go to the west-

85 ward with a signal of two whistles, passing under *La Champagne's* stern. In fact the signal of one whistle given under the present International Rules, and under the obligations of Article 19 in the circumstances of the *Lisbonense* and with her actual destination, was so singular a signal that I have some doubt whether the pilot of the *Lisbonense*, whose experience was not of the best, was mindful at the time he gave that signal of the obligation that Article 19 imposed, or had any thought of observing it. That the master had no such thought is to be inferred from his testimony that they steadied to keep the ship "in the proper place for entering the swash channel." The International Rules of 1885 are however expressly made
86 applicable to the "coast waters," and have been repeatedly held applicable in this situation.

The *Aurania*, 29 Fed. Rep., 98.
The *Non Pareille*, 33 Fed. Rep., 524.

La Champagne, therefore, not only had the right, but was bound to regard the signal given by the *Lisbonense* as notice that she was going off to starboard, and she did so understand it. This notice caused *La Champagne* to abandon the course to port which her pilot was about to adopt, and after proceeding as far towards the southerly side of the channel as was
87 safe, which I am satisfied she did, all that her master and pilot were required to do was to observe the movements of the *Lisbonense*, and when risk of collision appeared, to stop or reverse in time to avoid it. This is precisely what they did. They had the right to count upon the course of the *Lisbonense* to starboard which her signal had promised; they had no reason to suppose she was doing otherwise; and when *La Champagne* reversed, she reversed in time to avoid collision without aid from the *Lisbonense* had the *Lisbonense* been going upon the course to starboard which her signal had promised, and which *La Champagne* supposed she was pursuing. Had the *Lisbonense* been on that course, clearly no collision would have occurred, for
88 *La Champagne* would have been stopped before the *Lisbonense* was reached. The master and pilot of *La Champagne* had no notice, as I have said, that the *Lisbonense* was not performing her duty, or had not taken the course to starboard which her signal indicated; and they are not chargeable therefore with fault in not reversing sooner. As it was, two seconds more time would have saved the disaster, although the *Lisbonense* had precipitated collision by resuming her former course towards *La Champagne*, before her last porting. This last manœuvre of the *Lisbonense* was not in fact of any benefit, but disas-

trous. Her duty at a distance of 1,500 or 2,000 feet from *La Champagne* when the three whistles were heard was to stop and back in accordance with Article 18. Had she obeyed that article, a plot of the navigation shows that she would undoubtedly have thereby passed considerably astern of *La Champagne*. She was at that time too far off to plead a situation *in extremis*; for I wholly discredit her testimony as to her distance at that time; and even if *in extremis*, the plea would not avail, because the peril was by her own prior fault in changing her heading towards *La Champagne*. The *Elizabeth Jones*, 112 U. S., 514, 526; The *Maggie J. Smith*, 123 U. S., 349, 355. 89

The primary cause of the collision, however, was the neglect or misapprehension by the *Lisbonense* of the obligation imposed by Article 19 after her signal of one whistle was given. All that followed was the natural sequence of the disregard of that obligation. It was no fault in *La Champagne* that she did not anticipate or guard against the *Lisbonense's* violation of her duty, for at night her fault could not be perceived. No other fault being established against *La Champagne* the libel of the *Lisbonense* is dismissed, and that of *La Champagne* sustained. Decrees may be entered accordingly with costs. 90

July 3, 1891.

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Exhibit No. 2.

U. S. CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

Before Wallace, Lacombe and Shipman, Circuit Judges.

94 Robert Singlehurst, *et al.*,
Libellants and Appellants,
vs.
La Compagnie Générale Transatlantique,
Appellee.

95 This is an appeal taken by Singlehurst and others, owners of the British Steamship *Lisbonense*, from a final decree of the U. S. District Court for the Southern District of New York, adjudging the *Lisbonense* solely at fault for her collision with the appellee's steamship *La Champagne*, and dismissing appellant's cross-libel with costs.

Lacombe, J. :

The facts in this case will best be presented by stating the findings of the District Judge.

On December 7th, 1890, the *Lisbonense*, a steamer 270 feet in length, 32 feet beam, and drawing 19½ feet, was bound in to the port of New York, on a voyage from the Brazils. *La Champagne*, a steamer 503 feet long, 51½ feet beam, and drawing 25½ feet of water, was bound out from the same port. The latter on account of her deep draught was proceeding out around the Southwest Spit by way of the Main Ship Channel and Gedney's Channel; the former was coming in by way of the South Channel and the Swash, the axis of which crosses the Main Ship Channel at an angle on the southwest side of 10 3/4 points. Each vessel was in charge of a pilot and the master of each was on deck. The 96

night was clear, but dark, the tide had been running ebb two 97
hours, setting to the east, or southeast with a velocity of between
two and three knots; the wind was fresh from the northwest.
La Champagne in consequence of fog had been detained
over night in the Lower Bay, and resumed her voyage about
4 A. M. She passed the meridian of the Sandy Hook lights
at 5.20 A. M. As she passed she burned her private signal
torches and soon after burned a blue light for the pilot boat
outside to receive her pilot. Just prior to the burning of
these signals, while she was on the regular Main Channel
course, which is east by north 1/4 north, the red and white
lights of the *Lisbonense* were seen about two points on the
starboard bow. About the same time the green and white 98
lights of *La Champagne* and her signal torches were observed
by the *Lisbonense*, without knowing or noticing their precise
colors or character or understanding what line or what vessel
they indicated. The *Lisbonense* was then on the usual course
up the South Channel about northwest 3/8 north. The vessels
at the time of sighting were about two miles apart and
respectively a mile, and a mile and a half, from the point of
collision. The speed of *La Champagne* was about twelve
knots over the ground, the 10 1/2 knots derived from her engines,
running at 35 revolutions, being supplemented by wind
and tide. The speed of the *Lisbonense*, allowing for retardation
by wind and tide, was a little less than 7 1/2 knots. 99
The captain of *La Champagne*, upon sighting the *Lisbonense*,
observed her carefully with the alidade to see whether her
bearing changed or not in reference to the necessity of taking
precautions against collision. No change was apparent. When
the pilot of *La Champagne* sighted the *Lisbonense* he ordered
the engine to slow (an order which was not transmitted,though
he believed it to be carried out) and "ported a little to—as we
" call it—'shave' along the southerly side of the channel and
" about that time they (the *Lisbonense*, blowed the "whistle."
This was immediately answered by one whistle from *La Champagne*;
the vessels were then about three-fourths of a mile
apart. The District Judge finds that *La Champagne* "ported 100
her helm so as to change her heading about one quarter of a
point to starboard." That she did make such change is plain
upon the evidence, but it seems equally plain that such change
and the subsequent steadying was complete before the exchange
of whistles. The evidence of the captain of *La Champagne*
would support the inference that this was after the signals,
but is not so positive as that of the pilot, who places it
before, while the cross-libel alleges that *La Champagne did not*

101 *then* port (i. e. after signalling) and the answer of the latter does not aver that she *did then port*, but alleges that continuously "until the collision her course was that of the line of the (Main Channel)." We are satisfied, however, as was the District Judge that the course of *La Champagne* was in the southerly part of that channel, and that in an ebb tide with northwest wind, to have headed more to the starboard would have exposed her to serious risk of going ashore. She kept herself on the right-hand side of the channel as much as was prudently possible, but she put herself on that side before the signals were exchanged. The *Lisbonense* ported "so as to change her heading half a point or a point only; whereupon
102 she steadied her helm upon the proper course to go up the Swash Channel." The District Judge finds that "thereby she resumed substantially the same course she was on before." The appellant assigns this finding as error, contending that she swung from half a point to a point to starboard and was steadied on that new course. An examination of the evidence and of the chart satisfies us that the District Judge was correct in finding that, upon giving her signal she made no substantial change in her course. Disconnected references to the evidence of those on board might seem to support the appellant's contention, but taken as a whole that evidence indicates that she adhered to her intention, manifest from the moment
103 she entered the South Channel, to hold her course by the South and Swash Channel lights- the two channels are in the same course—and the location of the collision confirms this conclusion; had she steadied on her course to starboard she would have crossed the axis of the Main Channel to the eastward of the place of collision, proceeding not, as her cross-libel avers, up towards the Swash Channel, "or, as her Captain puts it "upon the proper course to go up the Swash Channel"—but toward the Romer Shoals.

The Captain of *La Champagne* continued carefully to watch the *Lisbonense*, and judging manœuvres necessary, stopped his engines and a few seconds afterwards reversed at full speed,
104 at the same time giving a signal of three whistles, which announced his reversal to the *Lisbonense*, and soon after repeated the same signal. The *Lisbonense* was all the time going at full speed and she continued at full speed until collision. The District Judge finds the distance between the two vessels, when the three whistles of *La Champagne* were blown, to be from 1500 to 2000 feet. Just before the collision the *Lisbonense's* helm was put hard-a starboard to ease the blow, which nevertheless cut into her counter about two feet.

The District Judge found the *Lisbonense* in fault because, having given a signal of one whistle, she did not conform her course thereto, and held *La Champagne* free from fault. 105

When the vessels sighted each other, *La Champagne* had the *Lisbonense* on her starboard hand.

We do not understand that either side contends that the locality was not within Coast-waters (covered by Chap. 350 of the Laws of 1885) where the Revised International Rules are to be followed, in which respect the case resembles that of the *Aurania* and the *Republic*, 29 Fed. Rep., 98, and does not call for an exact determination of the line where the "Coast waters" end and the "harbor" of New York begins.

The sixteenth article of those rules provides that if two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other. Had she been in the open ocean, *La Champagne* might have done this by coming to starboard, so as to allow the *Lisbonense* to go by a manœuvre, as her captain says, "so simple that there is no need of mentioning it," or she might have slowed or stopped so as not to reach the course of the *Lisbonense* till the latter had passed on, out of danger. We are satisfied, however, that the existing conditions of wind and tide, the depth of water in the South Channel, the length and draught of *La Champagne* were special circumstances involving such immediate dangers of navigation as would (under Art. 23) warrant her master in avoiding the particular manœuvre which compliance with the sixteenth article would naturally suggest. We are not satisfied, however, that down to the time when the whistles were exchanged, the navigators of the *Lisbonense* either knew or were fairly chargeable with knowledge of the fact that the existence of such special circumstances was going to prevent *La Champagne* from conforming her navigation to the requirements of Art. 16. We are not prepared to assent to the proposition contended for by the appellee that because deep draught steamers find it necessary to take the Main and Gedney Channel course, it is to be assumed that all steamers whose lights indicate that they are coming down the Main Channel are of deep draught, and as such under the special circumstance rule entitled to right of way over incoming steamers which are on their own starboard hand. Such may be the custom of the port, but it is not proved to be so in this case. Moreover, whatever doubt as to the character of the outgoing vessel might arise from the circumstance that she was in the Main Channel was in this case set at rest as soon as she signalled her

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109 intention to take a course which deep draught vessels could not follow. The authorities cited by appellee giving right of way to a vessel going with the tide do not apply, as these steamers were not navigating in the same channel.

If the *La Champagne* were to navigate under Article 16, the duty of the *Lisbonese* was plain. Article 22 required her to hold her course. After sighting, but before signalling, the pilot of the *La Champagne*, as above stated, ported a little, thus placing her as much on the right hand side of the channel as was prudent in view of the set of the tide, the direction of the wind and the other special circumstances. Both vessels thus proceeded on their respective courses, the navigators of *La Cham-*
110 *pagne* aware of the fact that special circumstances would prevent her manœuvering under the *Lisbonense's* stern by a swing to starboard, and expecting apparently that the *Lisbonense* would yield *La Champagne* the right of way (she being the larger vessel), possibly by going to port, or by slowing or stopping (as the *Lisbonense* had the tide against her, and could keep steerage way at a lower speed) before she reached the course of *La Champagne* through the Main Channel; the navigators of the *Lisbonense*, ignorant of the special circumstances, and therefore confident that under Article 16 she had the right of way. Unless in some way the navigators of the *Lisbonense* were apprised of the fact that *La Champagne* could not fulfill
111 the obligations of that article, and modified their navigation accordingly, or unless *La Champagne* made some change in her own navigation collision seemed inevitable; and up to the moment when there was a change of situation each expected the other to give way. The initiative was taken by the *Lisbonense*, which sounded a one-blast whistle. Under the situation, as she understood it, her duty was plain—she was to keep her course. The International Rules have provided for no signal whereby a vessel which intends to hold her course shall notify another of that intention. Article 19 provides as follows:

"In taking any course authorized or required by these regulations, a steamship under way may indicate that course to
112 any other ship which she has in sight by the following signals on her steam whistle, namely:

One short blast to mean: "I am directing my course to starboard."

Two short blasts to mean: "I am directing my course to port."

Three short blasts to mean: "I am going full speed astern."

"The use of these signals is optional, but if they are used the course of the ship must be in accordance with the signal made."

Under the act of February 28th, 1871 (Sec. 4412 U. S. Rev. **113**
Stat.), and its various amendments, the Board of Supervising
Inspectors have established regulations to be observed by steam
vessels when passing each other in harbors and inland waters,
which include rules for giving signals by blasts of the steam
whistle. "One short blast," and "two short blasts,"
are among the signals thus provided for, and the
giving of such signals when steam vessels are approaching
each other is made compulsory. The meaning of those
signals, however, is not the same as under the International
Rules, *one short blast* indicates only an intent "to pass to the
right or port side of the other;" *two short blasts*, an intent
"to pass to the left or starboard side of the other," but neither **114**
implies *ex necessitate* that such passing shall be accomplished
by any change of course, so that practically in many cases the
signal simply means "I have the right of way and mean to keep
it," or "I waive my right of way and will let you pass ahead of
me," or "I ask you to waive your right of way and let me
keep on, so as to cross your bows." To these signals the Inspector's
Rules require an answer from the other vessel, assent
to the proposed navigation being expressed by a like signal to
that received, dissent by an unlike signal. The International
Rules, it will be observed, call for no merely answering
signals, and require the vessel giving a signal to alter her
course in accordance with the signal made: The Inspectors' **115**
Rules provide for answering signals, but do not require that
a change of course shall accompany a given signal. Thus,
with singular fatuity, it has been provided, by authority competent
to regulate the giving of signals by steam vessels bound
in and out of seaboard harbors, that the same signal shall have
a different meaning when sounded on one side or the other of a
line, which is certainly invisible, and possibly cannot be definitely
located except by further legislation. In 1886 attention
was called to this unfortunate condition of affairs by the
learned District Judge of the Southern District of New
York in the case of *The Aurania and The Repubic*, 29 Fed
Rep. 98. That it adds to the perils of navigation in and out **116**
of seaboard harbors is manifest. Certainly there can be required
no stronger proof of prudence, care and skill in their
profession on the part of those navigators, who in the face of
such indeterminate regulations have for seven years piloted
millions of human lives over the debatable waters which intersect
the fair ways from the open ocean to the piers of New
York, without some catastrophe so serious as to make the responsibility
for the continuance of such conditions unpleasant
to contemplate.

117 In this particular case, however, both sides concede that the manoeuvres attending the collision were had in waters where the International Rules control. It does not appear that the navigators of either ship thought otherwise, but, reading their evidence, it seems impossible to escape the conviction that the habit of navigating under this double set of rules operated to confuse the minds of one, if not of both pilots, as to their obligations to sound whistles, and as to the meaning of the whistles they did sound. The pilot of the *Lisbonense* testified: "I "blew one whistle to let the steamer know I intended to pass "ahead of him * * * (that) had the right of way," and "I understood his answer of one whistle to mean 'all right.'"
118 In answer to further questions as to custom among seafaring people in this port, he also testified that when "vessels are crossing two vessels meeting end on almost, the "man that wishes to pass to the starboard side blows one "whistle and the other vessel responds with one; that means "both vessels pass to starboard, keep to the right, each vessel "to keep to the right." He added that as he understood the situation he "had the right of way * * * that was why he blew one whistle," so that *La Champagne* should "go clear of him," either by porting or by "slowing down and giving him a chance, not crowding him." Evidently he sounded his one-blast whistle with the understanding that it meant
119 only what it does, where the Inspector's Rules apply and did not *require* him to direct his course to starboard. The International Rules, however, under which he was navigating, authorized him to blow such whistle only when he was directing his course to starboard under their authority or requirements, but under those very rules, being on the starboard side of *La Champagne*, and not devised of peculiar circumstances affecting that vessel, he was not authorized to direct his course to starboard, but was, on the contrary, required to keep his course. To have thus changed his course, though a fault under the rules, would probably not have been by itself one contributing to the collision as it would have brought the *Lisbonense*
120 further to the eastward than she would have gone had she kept her course. Having given the one-blast signal, however, the *Lisbonense* was bound by Article 19 to direct her course to starboard, and her failure substantially to make such change was a fault contributing to the collision, because by not so navigating she failed to reach the course of the other vessel as far ahead of her as by her own signal she engaged to do; had she substantially so changed her course the collision would not have happened. We, therefore, concur with the District Judge in holding the *Lisbonense* in fault.

The pilot of *La Champagne* also was apparently confused as 121 to the meaning of the signals he received and gave. He testified: "(the *Lisbonense*) blowed one whistle signifying she "wanted to cross my bow and pass me on the port hand. I "acknowledged the signal, which is courtesy * * * signifying that I understood what he was going to do. * * * "It is the courtesy of captains of steamships and steamboats "about this harbor always to answer a signal given by another "ship to let them know you understand what they are doing. "(I) answered for that and no other reason, and gave no order because of having answered." He added that "he "thought it was proper for the *Lisbonense* to come to port "and that she should have given a two-blast signal," still he 122 "accepted the signal when it was given for courtesy's sake, "which is the practice of the port." Evidently he understood the signals as meaning what they do under the Inspector's Rules, namely, a proposition from the *Lisbonense* to pass him on his port side, and an assent by himself to such manœuvre, not appreciating the fact that when *La Champagne* gave her one-blast signal the nineteenth Article required him to direct her course to starboard. The Captain of *La Champagne* testified that he understood the signal of the *Lisbonense* to signify "I remain on the right side of the channel," and that *La Champagne's* signal imposed on her the duty of "keeping the right side of the 123 channel." While we are satisfied that *La Champagne* did keep as far to the starboard as, under the special circumstances of the case, she could with prudence, we do not find from the evidence that, subsequently to the exchange of signals, she directed her course to starboard, as Article 19 required her to do to keep in record with her own announcement of intention. Even if her momentary sheer to starboard took place, as the District Judge found, after the exchange of whistles, it was no more a substantial directing of her course to starboard than was the similar momentary sheer of the *Lisbonense*, and in no sense a compliance with the promise of her signal. Had she directed her course to starboard the collision would not have 124 happened; and while we cannot hold her in fault for not doing so under the special circumstances, we are of the opinion that, knowing of their existence, she was in fault for announcing to a vessel, not possessed of the same knowledge, a change of course which she could not carry out. The *Lisbonense* receiving such an answer to her own whistle was entitled to assume that the vessel giving it was not so affecting by special circumstances that she could not manoeuvre so as to keep out of the

125 way of the *Lisbonense*, by directing her course to starboard.
Even in the sense in which the signals were interpreted by
both pilots *La Champagne's* single whistle was a promise
not to interfere with the *Lisbonense* crossing her bows-
whether by changing her own course to starboard or by checking
her speed, and the pilot of *La Champagne* undertook to
check her speed even before he gave the signal by ordering
the engine to slow, an order which for some unexplained reason
was not carried out. Had *La Champagne* conformed her
navigation to the promise of her signal, under either interpretation
of it, the collision would not have happened. The captain
of *La Champagne* testifies that her pilot told him he was
126 on the point of giving a two-blast signal when the *Lisbonense*
whistled. Such a signal would have indicated certainly that
he was not coming to starboard, that his purpose was to cross
the bows of the *Lisbonense*, which under the special circumstances
he understood he had the right to do, and to which
purpose the navigation of *La Champagne* adhered after the
exchange of signals. When he received the one-blast signal
from the *Lisbonense* he had the option, either to answer with
two blasts, to keep silent, or to answer, as he did, with one.
In the first case he would have distinctly advised the *Lisbonense*
that despite Article 16 he considered the situation such
that *La Champagne* could not keep out of her way; that he
127 did not intend to do so by going to starboard; on the contrary,
that he was going to sheer to port, and thereafter the
navigator of the *Lisbonense* would be charged with knowledge
that *La Champagne* claimed to be navigating under the
Special Circumstance Rule, and expected him to keep
out of her way. Had *La Champagne* kept silent, the
Lisbonense would at least have been warned by that
circumstance that there was some uncertainty as to what the
former intended to do. But by answering with one blast she
announced her intention to do the very thing she could not do.
This was a fault. "Courtesy" might require an answer to a
signal, but certainly it did not call for an answer which, under
128 the rules governing her navigation, promised a manœuvre
which special circumstances forbade her carrying out.

Irrespective, therefore, of any faults in their subsequent navigation, the collision is to be attributed primarily to the giving by both vessels of signals to the promise of which the navigation of neither was substantially conformed.

Although the new proofs taken in the Circuit Court have neither altered nor made more certain the conclusions reached upon the apostles, the exception to their admission calls for an

expression of opinion from the Court. As to the record of 129
proceedings before the French Consul, so much of it as contains
the statements of the master is admissible under the authority
of *The Potomac*, 8 Wall., 590. In so far as it contains
the statements of others, it would be admissible only in contradiction
of testimony given by them in the case at bar, and
to which their attention had been called when themselves under
examination; the statements before the Consul of all
others than the master should therefore be stricken out, and a
similar disposition made of the proof as to what appeared on
the engine room dial. No one disputed that *La Champagne*
could run at a less speed than 10 knots, and, even if it were
disputed, the dial face was no proof of her possible speed. 130

The appellant excepted to the exclusion of the following
question put to the captain of *LaChampagne* "what information
or instruction did you intend the master of the *Lisbonense*
to gather from your answer of one whistle to
his one whistle?" The exception is unsound; the
question was immaterial. The issue was one of negligence
in answering the whistle with a single blast.
The fact of what he meant by his answer has nothing to do
with that issue. The statute as construed by the Court defines
the meaning of the whistle, and in determining whether he
was negligent in sounding it, his conduct must be tested by
that definition, not by what he intended his signal should 131
mean.

The decree of the District Court is reversed, with costs of this appeal to the appellant, and the cause remanded to that Court for further proceedings in conformity with the decision of this Court.

[Endorsed.] U. S. Circuit Court of Appeals, Second Circuit.
—Robert Singlehurst, *et al.*, Libl'ts. and Appellants *v.*
La Compagnie Generale Transatlantique, Appellee.—Opinion,
Lacombe, J.—United States Circuit Court of Appeals.
Filed Dec. 13, 1892. John A. Shields, Clerk. Second
Circuit. 132

133

Exhibit No. 3.

LA CHAMPAGNE and LISBONENSE.

WALLACE, C. J.:

When the vessels discovered one another they were about
two miles apart, *La Champagne* on a course W. x S., the *Lis-*
bonense on a course N. W. ⅜ N., the former going at a speed
of about twelve knots with the wind and tide, the latter at a
134 speed of about seven and one-half knots, the *La Champagne*
having the *Lisbonense* about two points on her starboard bow.
At this time the *La Champagne* was about one and one-half
miles from the place of collision, and the *Lisbonense* was about
one mile. When the vessels had approached to within about
a mile of one another, the *Lisbonense* gave *La Champagne* a
signal blast of the steam whistle, and altered her course half a
point or a point to starboard. *La Champagne's* pilot under-
stood this signal to mean that the *Lisbonense* proposed to pass
across the bows of the *La Champagne*, and he answered the
signal by one of a single blast from *La Champagne;* and the
pilot of the *Lisbonense* understood the signal of *La Champagne*
135 as an assent to the proposition of the *Lisbonense*. Owing to the
conditions of the wind, tide and the channel way, *La Cham-*
pagne could not alter her course to starboard. Her pilot
knew this when he answered the signal of the *Lisbonense*,
and intended to consent to allowing the *Lisbonense* to
pass ahead of *La Champagne*. The master of the *La Cham-*
pagne, however, supposed that his own pilot intended *La*
Champagne to pass ahead of the *Lisbenense*, and that the
Lisbonense would give way; and he did not understand the
signals as intended to indicate any different movements. After
the exchange of signals *La Champagne* proceeded, without
changing her course or speed, until the vessels were about seven
136 hundred yards apart, when her master seeing that the bearings
of the vessels did not change, and that they were drawing
rapidly together, so as to render the risk of collision serious,
and acting on his own judgment, ordered her engines stopped,
and in about twenty seconds ordered them backed. These
orders were promptly executed, and at the same time *La*
Champagne gave the *Lisbonense* a signal of three blasts of her
whistle. The *Lisbonense* in the meantime had kept on at full
speed, but altered her course to port, so as to bring her back

upon her course prior to the exchange of signals; and when 137
overlapping the bows of *La Champagne* put her helm hard starboard to throw her stern further away from *La Champagne*, but the latter struck her about twenty feet forward of the stern.

Somewhat before the exchange of signals, in view of the approach of the *Lisbonense*, the pilot of the *La Champagne* had ordered her engines slowed. By some inadvertence or misunderstanding this order was not communicated to the engineer, but the pilot was not aware of the omission.

Upon these facts I agree with the conclusion of the majority of the Court, that both vessels were guilty of fault contributing to the collision; but I differ with them in attributing 138
as the fault the failure of each to observe the requirements of Article 19 by directing her course to starboard after having given the other one blast of her steam whistle. Neither pilot supposed that the signals were given conformably with that article, but each supposed that the signal of the other was one given pursuant to the rules of the Supervising Inspectors. Neither was misled by the signal of the other, but each understood it according to its intended significance When the signals were exchanged there was ample time and distance for the vessels to regulate their respective movements so as to avoid a collision. Under these circumstances, it seems to me quite immaterial that neither 139
directed the course of his vessel conformably with the requirements of the signal of Article 19.

When the vessels discovered each other they were on crossing courses and under the operation of the rule which required the *La Champagne* to avoid the *Lisbonense*, and required the *Lisbonense* to keep her course. At the distance from the intersecting point in there courses at which each vessel was at the time, if both maintained their respective rates of speed, both would arrive at the intersecting point at substantially the same moment; and this fact must have been obvious to each before signals were exchanged, because during the intervening distance their could not have been any change of the bearings 140
of their respective lights. Thus for some little time before the signals were exchanged the pilot of each vessel was bound to know that the situation demanded great vigilance, and that any infraction of the rules of navigation on his own part would embarrass the other and might lead to a misunderstanding and precipitate a collision. The situation of the *La Champagne* was such that she could not undertake to fulfil her duty of avoiding the *Lisbonense* by altering her course to starboard

141 and passing astern of the *Lisbonense*; but this did not absolve her from the duty of avoiding the *Lisbonense* by some other manœuvre, if any other was practicable. The choice was open to her of altering her course to port, and going across the bows of the *Lisbonense*, if that could be done safely, or of reducing her speed until the *Lisbonense* should pass beyond the point where there was danger of collision. The pilot of the *La Champagne* very prudently ordered her engines slowed to enable her to give way to the *Lisbonense* if he found that to be the safer way. Apparently before he had fully determined what course to pursue the *Lisbonense* gave a signal of a single blast, and this signal he immediately answered by a like
142 signal. Both pilots understood these signals meant that the *Lisbonense* intended to pass in front of the bows of the *La Champagne*. The fact that these signals were exchanged is persuasive evidence that in the judgment of both pilots at the time that was the preferable way of avoiding a collision in view of the existing situation. After these signals were exchanged *La Champagne* could not prudently attempt to pass in front of the *Lisbonense*, and the only thing she could do properly, as she could not alter her course to starboard, was to reduce her speed and proceed cautiously until it should appear that the *Lisbonense* had fully passed beyond the point of danger. The *La Champagne* did not reduce her speed. Her
143 pilot probably miscalculated it, supposing his order to slow had been obeyed. If that order had been obeyed, it would not have been necessary to stop and reverse before the time when the master of *La Champagne* ordered this to be done. As it was, the pilot did not give these orders in due season, and the master found it necessary to interpose and give them himself, taking the responsibility of navigating the vessel. He delayed too long, relying on the judgment of the pilot.

If the *Lisbonense* had not changed her course after the exchange of signals, and *La Champagne* had stopped and backed when she did, the collision would not have taken place. The change of course by the *Lisbonense* back to port brought the
144 vessels considerably nearer together. It is impossible to determine just when this change of course was made. Her duty was to keep her course until danger of collision had been passed. That duty on her part was as imperative, after the exchange of signals, as was the duty on the part of *La Champagne* to do all in her power to avoid the *Lisbonense*. If there were any circumstances in the situation which rendered it impracticable for the *Lisbonense* to maintain the course she was on when she gave signal to the *La Champagne*, she should not have

given that signal. It may be believed that if either vessel had done her whole duty pursuant to the rules of navigation, there would not have been a collision; but it cannot be demonstrated that the failure of either to follow the rules was innocuous. There was but little time for observation of the other by either vessel after the *Lisbonense* made her last change of course to port. Each was then in a situation which was full of peril. All that is manifest is that if *La Champagne* had stopped and backed in season, or if the *Lisbonense* had not, by altering her course to port, brought herself nearer to *La Champagne*, the collision would not have occurred. 145

The case is therefore one for a division of the loss.

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(Endorsed) United States Circuit Court of Appeals, Second Circuit, filed Dec. 13, 1892, John A. Shields, Clerk.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1892.

In the Matter of the Petition

of

LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

Brief in Support of Petition.

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Supreme Court of the United States,

OCTOBER TERM, 1892.

In the Matter
of
The Petition of La Compagnie Générale Transatlantique, for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

Brief in Support of Petition.

Statement.

This is an application for a writ of *certiorari* to bring before this Court the case entitled *Robert Singlehurst, et al., cross-libellants and appellants, against La Compagnie Generale Transatlantique, libellant and appellee,* now pending in the Circuit Court of Appeals for the Second Circuit.

The grounds of the application are: (1) That the case is a grave and important one in view of the several novel questions of law involved, the proper decision of which widely affects commerce and navigation; (2) that a diversity of opinion exists between the Judges who have passed upon them; (3) because the Circuit Court of Appeals in deciding to modify the decree of the District Court disregards controlling facts, is unsound in its reasoning, and disposes of the case in opposition to established rules of law and of navigation; and (4) because of the large amount of damages involved.

The case is one of collision between the French steamship *La Champagne* and the British steamship *Lisbonense* in the Main Channel just outside of Sandy Hook before daylight on the morning of December 7, 1890.

The facts concerning the collision are fully set forth in the petition, and need not be repeated here.

See Petition, paragraph "Third."

The questions arising in the case, most of which are novel as well as very important, are also fully set forth.

See Petition, paragraphs "Fifth" and "Eleventh."

The petition also shows in what particulars the Judges disagree.

See Petition, page 2, folio 7, and paragraphs "Seventh;" "Eighth," "Ninth" and "Tenth."

The matters in which the Circuit Court of Appeals have disregarded established rules of law and navigation are also stated.

See Petition, paragraph "Thirteenth."

The amount involved aggregates $129,500, and the damages of the petitioner alone are $106,000.

See Petition, paragraph "Fourth."

The Writ Should Issue.

It is not deemed necessary, nor does it seem to us as proper, to enter into an extended discussion of the merits, for to do this would be to argue the case.

We have attempted in the petition to set forth the salient features of the case, and we submit that it is almost apparent without any argument that it is one clearly within the class in which the writ of *certiorari* should issue under the fourth section of the act of March 3, 1891 (26 Stat. L., 82), as viewed by this Court in other cases.

I.

The Questions Involved are Grave and Important.

Aside from the large damages suffered by the petitioner, and leaving out of view the consideration that the controversy is between *foreigners* and the collision between *foreign ships*—(subjects of jurisdiction always to be gravely and delicately considered—,) the case itself presents numerous important and novel questions.

(1.) The single question presenting itself at the threshhold of the case, namely, whether or not the rule laid down by this Court in the case of the *Galatea* (92 U. S., 439), and followed in numerous other cases, to the effect that where one of two vessels should stop, one going *with* the tide, and the other going *against* the tide, the one going *against* the tide should stop, as she can control her movements whilst the other cannot, is confined only to vessels navigating the *same* channel in name, or whether it extends, as its reason clearly shows it ought to be, to *branches* or other channels in name, *converging or running into the channel of danger*, and subject to precisely the same tidal conditions and influences, is alone sufficient, as it seems to us, to place this case in the category of "grave and important cases," especially when it is considered that the channel of this collision is the highway of the great bulk of the commerce of the country, over which the ships of all nations, laden with millions of dollars' worth of property, and thousands of human lives, pass every day. Surely, any question as to the proper navigation of such a place is a matter of important and grave concern, not only to our own people, but to all commercial nations.

It was a fact in this case, proved to the satisfaction of the District Court and found to be true by the Circuit Court of Appeals, that *La Champagne* was not only *descending* the channel *with* the tide, but that it swept diagonally across her course and that this fact, together with the strong wind aiding the adverse tidal influence, and considered with reference to the nearness of shoals, placed her in a situation of *special circumstances*, and rendered it impossible for her to manœuvre.

It was also established, not only to the satisfaction of the District Judge, but to the satisfaction of the Circuit Court of Appeals as well, that the *Lisbonense* was coming up *against* the same tide.

It is true that the captain and pilot of the *Lisbonense* testified that they had the tide on their *port beam;* but the unanswerable evidence of the Coast Survey charts, together with the absurdity of a tide running *athwart a channel*—(which had to be the case if, as was the fact, they were passing along the *course* of a channel and had a tide on either *beam*—),were too convincing to permit this falsehood to prevail, and their statements in this particular only weakened their testimony on other points.

We say that, under those circumstances, it was the duty of the *Lisbonense* to have *stopped* and let *La Champagne* pass out. The Circuit Court of Appeals, however, held that the rule in the case of *The Galatea* and other cases did not apply; but the only consideration that Court gave to the subject was the following: "The authorities cited by the appellee, giving right of way to a vessel going with the tide, do not apply, as these steamers were not navigating the same channel."

This is absolutely all the attention the Circuit Court of Appeals bestowed upon the point ; and we submit that, almost obviously, the decision is wrong, because if the rule applies to two vessels already *in* a channel, how much more so ought it to apply to a vessel *outside*, and forbid her *entering* the channel of danger, especially when by having the tide against her, she has control of her movements in the outer channel as well as in the one she proposes to enter.

The Main Channel through which *La Champagne* was passing, and in which this collision occurred, *converges* into the South Channel, (up which the *Lisbonense* was coming), at an angle of about 60 degrees, and though *nominally different* is yet a *branch*, because vessels coming up the South Channel frequently turn into and come up the Main Channel instead of continuing up "the Swash," as it is called.

We say that the decision of the Circuit Court of Appeals in this respect is clearly erroneous ; and yet, if allowed to stand, it not only places judicial decision at variance with settled customs of navigation, but, as we respectfully submit, furnishes a vicious rule for the decision of other cases.

(2.) The question as to whether or not the International Rules apply to the place of this collision is also, we submit, such a substantive and important one as to call for the decision of this Court.

The question has never been passed upon by this Court.

It was very ably discussed by Judge Brown in the District Court for the Southern District of New York, in the case of *The Aurania* and *The Republic;* (29 Fed. R., 98), and that learned Judge has followed his decision in that case in other cases.

> See also The *Non Parielle*, 33 Fed. R., 524 ; The *Excelsior*, 33 F. R., 554.

The same rule was applied by the District Judge in the present case (see Petition, appendix, p. 22), but the Circuit Court of Appeals said (Petition, appendix, p. 27) that as it understood that neither party contended that the International Rules did not apply, the case did not call for determination.

In the case of the *Aurania* and the *Republic*, Judge Brown made this observation :

"Considering that Gedney's channel across the bar is the "principal, if not the only, thoroughfare for deep-draught "vessels in coming into and going out of the harbor of New "York, it is *a matter of surprise as well as of regret* that "where two vessels are going down the bay, and are approaching that fairway, the one by the Swash channel, and "the other by the Main or Horseshoe channel, *any doubt or "uncertainty should exist* which of them should keep out of "the way of the other. It is *still more to be regretted* that "any doubt should exist, since our adoption of the new International Rules by the act of March 3, 1885 (23 St. at Large, "438), whether the case is governed by those regulations, or "by the rules previously existing and embodied in the Revised

"Statutes (section 4233), and by the local rules adopted by "the Supervising Inspectors. And yet, at the very threshold "of this case, *I find a difficulty and embarrassment in determining which set of rules is applicable to vessels navigating in harbors within our coast waters that I have not been able satisfactorily to solve.*"

It does seem to us, therefore, that this question is also of sufficient importance to call for the decision of this Court.

(3.) So, also, as to the question whether or not a signal given in *answer* to a signal indicating a course under the 19th Rule of the Road signifies (as the Circuit Court of Appeals held) that the answering vessel undertakes to do the *same thing* or perform the *same manœuver* as the signaling vessel, especially when it is admitted that the answering vessel is in such a situation of special circumstances as to render it *impossible for her to perform such manœuver.*

The Circuit Court of Appeals in the present case, without statutory provision to support it, without evidence that such was the understanding of navigators, against the testimony in the case that it signified something *entirely different*, and in the face of uncontradicted evidence that the navigators of other vessels *did not so regard it*, ruled, nevertheless, that an *acknowledgment* of, or *answer* to, a signal by another vessel, by a corresponding blast, signified and was notice that the answering vessel intended to perform the *same manœuvre* as the vessel taking the initiative, and held *La Champagne* partly in fault for not, (as that court found), doing the *same thing* as the *Lisbonense*, when it was conceded by the Court that *La Champagne*, by reason of special circumstances, was in a situation where she *could not perform the manœuvre!*

It is urged, with all due respect to the learned Judge delivering the opinion of the Circuit Court of Appeals, that this reasoning is contradictory. unsound and inconclusive, and, upon the conceded facts, wholly insufficient to impute fault to *La Champagne.*

The question itself, however, independently of the facts of the case, namely, the signification of *answers*, if answers are permissible under the 19th Rule, is a serious and grave question which, we submit, ought to be settled by this Court.

(4.) Judge Wallace, in his opinion, proceeded on the ground that the pilots of the two steamers were navigating under the Inspector's Rules instead of the International Rules, *although he did not deny that the International Rules governed the locality where this collision occurred.*

The Act adopting the International Rules of 1885 says that "the following Revised International Rules * * * *shall* be followed," etc., (23 Stat. L. 438), and the question arises as to *whether or not this imperative language can be disregarded by the courts* and liberty afforded to gather, from circumstances and partial declarations, the conclusion that vessels are being navigated by *some other system*, and apply the latter when the statute says that Rules enacted *shall govern* the situation.

It seems to us that this question, though appearing in what may be regarded as a dissenting opinion, is one of sufficient importance to receive the attention and considerate judgment of this Court.

II.

The Judges who passed upon the case differ in their views of it.

As pointed out in the Petition, (paragraphs "sixth," "eighth," "ninth" and "tenth,") the Judges who have considered the case differ in their opinions, the District Judge wholly condeming the *Lisbonense* and excusing *La Champagne* entirely; two of the Circuit Judges, whilst concurring with the District Judge as to the faults of the *Lisbonense*, nevertheless finding *La Champagne* in fault also; and another Circuit Judge differing from all of the other Judges, though concurring in the ultimate decision of the majority of the Circuit Court of Appeals in holding both vessels at fault.

This fact alone, it is true, may not be sufficient, in ordinary cases to warrant the issue of a writ of *certiorari;* but when considered in connection with the questions involved, the importance of the case, and the decision as a whole, it is nevertheless, we respectfully submit, a very material circumstance to be considered.

III.

The decision of the Circuit Court of Appeals is unsound in its reasoning, and opposed to established rules of law and of navigation.

Up to this point we have discussed the case merely abstractly, with a view to show the general questions presented for decision.

We will now briefly touch upon the merits.

The District Court found as facts:—(1) that *La Champagne*, by reason of her size and draught, the conditions of wind and tide, and the nearness of shoals was in a situation of *special circumstances* which prevented her from freely manœuvering in the channel, and that she, therefore, *could not* keep out of the way of the *Lisbonense* ; (2) That the *Lisbonense*, by reason of her *light draught*, and having the *tide ahead*, etc., had free *free control of her movements* and could have avoided not only collision itself, but even *danger* of collision ; (3) that instead of observing due precaution to avoid danger, the *Lisbonense*, without either satisfying herself of *La Champagne's* peculiar situation, or even considering the probabilities in that regard, *took the situation into her own hands ;* (4), that by giving a single blast of her whistle the *Lisbonense* was *bound* to go to starboard under the 19th Rule ; (5) that, though she did change momentarily and slightly, she *resumed the same course* shortly afterwards without notice to *La Champagne*, and then kept on up the channel, substantially in the direction she was going before sounding her whistle ; (6) that *La Champagne*, whilst going through her channel at half speed, *answered* the *Lisbonense's* whistle and *went to starboard herself* as far as she *could* do so with safety to herself, and thereafter kept close to the right side of the channel, still at half speed; (7), that *La*

Champagne's captain and pilot continued to carefully watch the bearing of the *Lisbonense,* and seeing that it did not change and that the two vessels were rapidly approaching each other the engines of *La Champagne* were stopped and a moment later reversed full speed astern, and that this was indicated by three blasts of her whistle, which was the proper signal provided by the 19th Rule; (8) that at the same time the *Lisbonense*, being then still from 1500 to 2000 feet distant, bearing about two points on the starboard bow of *La Champagne*, and *far enough off to avoid collision by also reversing herself*, and not in a situation where she could excuse herself of a false manœuvre by pleading that she was *in extremis*, failed to perform her *duty to stop and back* under Article 18, but on the contrary *kept on at full speed*, and, by porting, threw herself across the path of *La Champagne* and fell into collision at about right angles.

The conclusion of the District Judge was that the *Lisbonense,* as above stated, was *wholly to blame* for the collision and that *La Champagne* was *free from fault;* and he assigned, as the primary cause of the collision, the slight change of heading by the *Lisbonense* after giving her signal indicating that she was going to starboard, and then *her resumption of her former course;* but that, even disregarding this fault, she could still have avoided collision by reversing. (Opinion, Petition, fols. 89, 90.)

A majority of the Judges of the Circuit Court of Appeals concurred with the District Judge in finding that the *Lisbonense* did not comply with her signal indicating that she would go to starboard, and held with him that her slight change, and then resuming her former course, was a fault, and that this fault brought about the collision. They concurred also with the District Judge in his finding and conclusion that *La Champagne* was in a situation of special circumstances, which prevented her from freely manœuvreing; that the stress of her situation was such that she could not keep out of the way of the *Lisbonense*, and was therefore excused from her ordinary obligation to do so under the 16th Rule; that *La Champagne* actually went to starboard all she prudently or safely could ; but that notwithstanding these facts she ought not to have answered the *Lisbonense's* whistle ; that, by answering she, too, was obliged to go fully to starboard,—(a thing which the Judges concede she could not do),—although it is shown that the navigators of the *Lisbonense did not expect her to do so*; and that whilst *La Champagne* did in fact go to starboard all she safely could, yet that this manœuvre, the two judges of the Circuit of Appeals found, (absolutely against the evidence, as we shall presently show), was, as they say, finished and complete *before* she sounded her answering signal, and that *La Champagne* was therefore also to blame.

Had the Judge who delivered the opinion of the Circuit Court of Appeals *predetermined* to find *La Champagne* partly in fault, and to divide the damages, he could scarcely, we respectfully submit, have placed their judgment on less defensible grounds.

IV.

The decision holding " La Champagne " partly to blame is clearly erroneous and should be reversed :

The Galatea (supra); DeVere, Record fol. 215; Boyer, fol. 77, 165.

(1.) Because the Judges have utterly disregarded the fact that *La Champagne* had the right of way.

(2.) Because the statute does not give to an *answering* signal any such meaning as attributed to it by the Court below. The meaning of signals under the 19th Rule is defined, but there is no definition whatever of an *answering* signal, *nor does the statute forbid an answer.* (See 19th Rule.)

(3.) Because the *uncontradicted testimony* in the case shows that *La Champagne's* answering signal signified, *according to custom and general understanding*, merely that she *understood* what the *Lisbonense* intended to do.

See testimony of Pilot DeVere, Record fol. ~~215;~~ 208, 220
~~Captain Royer, Record fols. 77 and 165.~~

(4.) Because the answering whistle of *La Champagne* has the same signification under the Inspectors' Rules as it was shown by custom to have under the International Rules, and this analogy should have been adopted by the Court below rather than the forced construction which it in fact did adopt, especially when, as we shall next see, *La Champagne's* signal *did not mislead* the *Lisbonense*, and, therefore, the only effect of the decision was to hold *La Champagne* in fault on *a bare technicality.*

See The Garlick, 20 Fed. R., 647;
The Nereus, 23 Fed. R., 448;
The Greenpoint, 31 Fed. R., 231, and cases cited.

(5.) Because the navigators of the *Lisbonense did not understand by La Champagne's answer that she too was to go to starboard.* The only witness testifying to this point was Winters, the pilot of the *Lisbonense*, who said that he understood *La Champagne's* answer to mean "*all right.*"

Winters, Record, folio 616, 679, 683.

The *Lisbonense*, in other words, did not suppose *La Champagne* would go to starboard, as the Court below held she should, and therefore, as her navigators were *not misled*, the signal, though meaning what the judges say, *was wholly immaterial.*

(6.) Because the judges of the Circuit Court of Appeals concede that *La Champagne* did go to starboard as much as she could, and the evidence conclusively shows that this was *after* she gave her answering signal.

Before referring to the testimony, it may be well to understand clearly the point of the decision in this regard.

The 19th Rule provides: "One short blast to mean, I *am* directing my course to starboard."

The Circuit Court of Appeals holds that a blast given *after* going to starboard, even though a moment after, is a fault, notwithstanding it is shown that it did not in the least mislead! We say this is rather technical.

But it is untrue, in fact in the present case; and, in reaching the conclusion, the learned Judge delivering the opinion of the Court below overlooked, or wholly disregarded, the testimony upon the point as a whole.

The only evidence in the case is the testimony of the Master, the Pilot, and the Second Captain of *La Champagne*. The testimony of the latter seems not to have been observed by the learned Judge, for he refers only to the testimony of the Master and Pilot. (Petition, folio 100.)

Now this is the evidence :

Captain Boyer testified (Record, folios 182, 185): "Q. Did you or your pilot give any order to the helm from the time of the first whistle of the *Lisbonense* to the collision ? A. Yes. As I have just said, we gave the order to steer *a little to right of the axis of the channel.*

"Q. What were the words of the order ? A. I don't know, but probably the pilot said port ; I repeated it, and the officer repeated "Tribord un peu-port a little."

"Q. Do you recollect when that was with reference to anything you have mentioned as to your vessel's movements ? A. *After the exchange of the first blast of the whistle.*"

"Q. How much did your vessel change under that ? A. I can't say exactly, but I think it must have been *three or four degrees ;* but our course was *a little more than that,* probably on account of the current, which took us crosswise."

The Second Captain, who was stationed forward in a position most favorable for accurate observation, and in narrating the facts in consecutive order, after testifying to the signals to the Sandy Hook pilot boat, says (Record, folios 338, 339) :

"Then I heard blasts of the whistle exchanged between the *Champagne* and the *Lisbonense*, and *then* I saw by the change in the direction of the light that the *Champagne came to on the starboard hand a little as she went down the channel.*

"Q. I don't quite understand what you mean by 'coming to.' A. That *she came to on the starboard side, she swung to starboard.*

"Q. To her own starboard ? A. Yes, *to her own starboard hand.*

"By Mr. Jones : Q. In other words, she came a little to the right hand ? Q. *Yes, she changed her course to the starboard hand in such a way as to take the right-hand side of the* *channel.* There the vessels continued to approach each other," etc.

The learned Judge in the court below says, however (Petition, folio 100), that "the evidence of the Captain of *La Champagne* would support the inference that this (the going to starboard) was after the signals, but is not as positive as that of the pilot."

All the pilot says is (Record, fol. 218): "When we sighted the *Lisbonense* and when we were getting out close to her I ported a little—as we call it—'shave' along the southerly side of the channel and then steadied her, and about that time they blowed the whistle."

How the learned Judge could say from this evidence that *La Champagne* went to starboard *before* answering the *Lisbonense's* whistle we are unable to understand.

(7.) No weight whatever is given by the Judges of the Circuit Court of Appeals to the established rule that "where one " ship has by wrong manœuvres placed another ship in a position of extreme danger, that other ship will not be held to " blame if it has done something wrong, and has not been " manœuvred with perfect skill and presence of mind," (Mr. Justice Blatchford, in the case of *The Elizabeth Jones*, 111 U. S., 514, 526, quoting Lord Justice James, in the case of *The Bywell Castle*, 4 P. D., 219); or, as otherwise stated, "if one " vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given " might have been more fortunate will not prevent the recovery of full damages." (Mr. Justice Field, in the case of *The Maggie J. Smith*, 123 U. S., 349, 356.) Even conceding, therefore, that *La Champagne* did not go to starboard after answering, and conceding that such was her duty, she was excusable under this rule.

It should be borne in mind that the entire interval between sighting the *Lisbonense* and the collision was but 9 minutes (Boyer, folios 62, 63, 97) and the interval between the exchange of whistles considerably less (Boyer, fol. 69.)

Had the *Lisbonense* not violated the law and placed *La*

Champagne in a position of great danger the collision would not only have been avoided, but *La Champagne* would, as the District Judge shows, have passed entirely clear.

Petition, fol. 89.

V.

The case is one for Certiorari.

Of course in a rapid summing up of the case for the presentation of this motion only the leading features can be touched upon.

We make no attempt, therefore, to examine the opinion of Judge Wallace, first, because it is so far divergent from the views of all the other judges as to practically amount to a dissenting opinion; and, secondly, because to criticise it seems to us to call for more of a discussion of the merits than this application either demands or permits.

We have only alluded, as before stated, to the chief features of the case. There are others of general interest, notably, (1) as to how far new testimony is permissible in the Circuit Court of Appeals (Record, folio 1122); (2) whether or not a captain's examination before a foreign consul amounts to the same as a protest; and (3) whether a protest is admissible at all unless it be shown that the captain is dead or his testimony cannot be secured (Record, fols. 1519, 1520).

From the statement of the points involved as set forth in the Petition, and from what we have said above, it is apparent, without argument, as it seems to us, that the case comes within the rule that *certiorari* will issue under the 6th section of the Act of March 3, 1891 (26 Stat. L. 82) in cases of "gravity and importance," or where "uniformity of decision" is desirable.

Lau Ow Bew, 141 U. S., 587;
S. C., 144 U. S., 58;
Fabre vs. Cunard Steamship Co., October Term, 1892 (not reported).

This Court in the case of Lau Ow Bew (*supra*) granted a writ of *certiorari* because the question related to the right of certain subjects of a foreign nation to freely pass out of, and return again to this country.

If that was a question of gravity and importance, and one in which the writ should be issued in the interest of uniformity of decision, how much more so is this in which the commercial interests of the people of *all* nations are concerned?

This Court also very recently granted the writ of *certiorari* in the case of Fabre *v.* The Cunard Steamship Co. (*supra*, not reported), in which the amount involved was but very little greater than the amount in this case, and where there was but *one* question, and that a *mixed question of law and fact*, namely, whether or not under the circumstances of the case the *Iberia* was in fault because she did not further reduce her speed in a fog after she heard a whistle in dangerous proximity.

It cannot be objected that the case comes within the cases of McLish *v.* Roff, 141 U. S., 661; Rice *v.* Sanger, 144 U. S., 197; Meager *v.* Minnesota Thresher Mf'g. Co., 145 U. S., 608; and Chicago & Northwestern Ry. Co. *v.* Osborne, 146 U. S., 354.

The refusal of the writ in those cases was based, as we understand, upon the ground that they were merely cases in which new trials were granted, and as granting a new trial is not final and does not conclude the ultimate rights of the parties, the party claiming to be aggrieved might still succeed upon a new presentation of the facts notwithstanding the adverse decision.

This is obviously, we respectfully submit, not such a case.

The law and rights of the parties are, unless reviewed by this Court, *finally decided*.

The writ should be granted as prayed.

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New York City.

EDWARD K. JONES,
Advocate.

1309 149 U S 786

Office Supreme Court U. S.
FILED.
MAR 20 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

In the Matter of the Petition of

LA COMPAGNIE GENERALE TRANSATLANTIQUE,
For a Certiorari in the Case of
ROBERT SINGLEHURST, and others,

vs.

LA COMPAGNIE TRANSATLANTIQUE,
Now pending in the Circuit Court of Appeals,
FOR THE SECOND CIRCUIT.

BRIEF,

ON BEHALF OF SINGLEHURST, and others.

SIDNEY CHUBB,
Proctor,
For Singlehurst, and others.

R. D. BENEDICT,
Advocate.

NEW YORK.
C. H. JONES & CO., PRINTERS, 114 FULTON STREET.
1893

To the Honorable the Supreme Court of the United States.

IN THE MATTER

OF

The Petition of La Compagnie Generale Transatlantique for a *certiorari* in the case of ROBERT SINGLEHURST, *et al.*,

vs.

La Compagnie Generale Transatlantique, now pending in the Circuit Court of Appeals for the Second Circuit.

Brief in behalf of Singlehurst, et al.

A copy of the petition in the above matter has been served on us, with a notice that it was to be presented to this Court on March 20th, and that a copy of the record in said action would be presented with said petition.

On examination of such petition we find many statements in it which are erroneous, and to which we think the attention of this Court should be called.

First Point.

As to the diversity of opinions among the Judges who heard the case (Pet., fol. 7), there was no diversity among the Judges of the Circuit Court of Appeals as to the fault of the *Champagne*.

The two vessels were on crossing courses, the *Champagne* having the *Lisbonense* on her starboard hand, in which position it was the duty of the *Lisbonense* to keep her course and of the *Champagne* to give way. A single whistle was blown by the *Lisbonense* and was answered with a single whistle by the *Champagne*.

The Circuit Court of Appeals decided that both pilots understood that whistle to mean that the *Lisbonense* would cross ahead of the *Champagne*, and that the *Champagne* would allow her to do so, either stopping her speed or changing her course to starboard sufficiently therefor.

The opinion of the majority of the Circuit Court says (Pet., fol. 125): "Had the *Champagne* conformed her course to her signal * * * the collision would not have happened." And again (fol. 128): "The collision is to be attributed primarily to the giving, by both vessels, of signals, to the promise of which the navigation of neither was substantially conformed."

The opinion of Judge Wallace holds also that after the giving of the single whistle the only thing the *Champagne* could do properly was to reduce her speed in order to allow the *Lisbonense* to pass ahead of her, which she did not do.

And both opinions dwell on the fact that the pilot of the *Champagne*, when the whistle was blown, gave the order to slow her engines, which order *was not obeyed.*

All three of the Circuit Judges concurred in holding the *Champagne* in fault. And they concurred in reversing the District Judge who had held her free from fault.

The disagreement between the Circuit Judges was not as to fault on the part of the *Champagne* but as to the fault of the *Lisbonense*.

That they did not agree as to her, while agreeing as to the fault of the *Champagne*, is no reason why a petition of the owners of the *Champagne* for a review of the case by this Court should be granted.

Second Point.

The petition states as a fact (fol. 13) "that, if the *Champagne* had stopped or materially arrested her headway or changed her heading much to starboard, she would have incurred serious risk of running aground."

Such was no doubt *the contention* on behalf of the *Champagne.*

But it was contested by us on behalf of the *Lisbonense.* And we pointed out that the *Champagne* had a tug alongside of her; that she did not run aground, although according to her own witnesses she kept on without lessening her speed for a thousand feet or more, then stopped and backed her engine till the collision, then turned completely round in the channel, in the course of which she got entangled with buoy No. 3, from which, as will be seen by an examination of the chart attached to the record, the nearest point of shoal is almost half a mile distant. These facts showed, as we maintain, that the *Champagne* could have lessened her speed before she stopped her engine without a particle of danger. She did not need ten seconds more to have passed astern of the *Lisbonense* without collision and if, when she blew her whistle, she had lessened her speed, as her pilot ordered, and supposed was done, she would have passed in safety under the stern of the *Lisbonense*, and would not have had to turn around at all. If she did not drift within half a mile of the shoal, though exposed to the tide for fifteen minutes while turning round, clearly she would not have run any danger of getting aground if she had not had to turn round.

Third Point.

The petition states (folio 14) that the signals of the *Champagne* "were seen by the navigators of the *Lisbonense*, and denoted to them, had they been watchful and duly remarked the situation, that the *Champagne* was bound out through Gedney's Channel, and that she was probably of such heavy draft as not to be able to go out any other way."

It is true that such was the contention on behalf of the *Champagne*, but the evidence did not sustain it. In order to sustain that proposition, the owners of the *Champague* would have had to prove that *none but* heavy draft steamers went out through Gedney's Channel. Of this there was not a particle of evidence.

Fourth Point.

The petition states (folio 14) "that the navigators of the *Lisbonense* also knew, or ought to have known, that from the force and direction of the wind and the set of the tide the *La Champagne* could not port her helm very much without risk of going ashore."

Such was, no doubt, the contention of the *Champagne*; but on behalf of the *Lisbonense* we deny that contention. We claim that from the fact that the *Champagne* answered the single whistle of the *Lisbonense* by giving a single whistle herself, the navigators of the *Lisbonense* had the right to assume that the *Champagne* *could* do what her whistle said she *would* do.

Fifth Point,

The Petition at folio 15, referring to the exchange of whistles, claims that the blowing of the single whistle by the *Lisbonense* was improper and wrongful and without justification or excuse.

It will be seen by reference to the pleadings of the *Champagne* that there was no suggestion made in her answer that the blowing of such whistle by the *Lisbonense* was improper, nor was it anywhere claimed in said answer to have been a fault. Where the faults charged upon the *Lisbonense* were specified, no mention was made of it. Moreover the evidence showed that there was no misunderstanding by the navigators of either vessel of the meaning of the single whistle blown by the other.

Sixth Point.

The Petition states (folio 18) that "the statements of the navigators of both vessels agree that the real danger of collision did not arise until this time," that is, until the *Champagne* stopped and reversed her engine.

This statement of the Petition is entirely incorrect. The pilot of the *Lisbonense* testified that there was danger of collision when he blew one whistle; that there was danger of collision from that time on, and that it was perceived that there was danger of collision unless the *Champagne* slowed or ported, and that all this was perceived before the *Champagne* stopped and reversed her engines. (See record, folios 436, 464, 476.) It also appeared that the navigators of the *Champagne* ought to have perceived that there was danger of collision before the engines of the *Champagne* were stopped and reversed; because the stopping and reversing of her engines was not done by the order of the pilot, but by the captain, who stood by him on the bridge, and who, perceiving *that the order was not being given in time*, took the control of the matter out of the hands of the pilot, and himself gave the order to stop and reverse the engines.

Seventh Point.

In the ninth paragraph of said Petition is attempted to be set forth " the substance and general effect of the opinion of two of the judges of the Circuit Court."

But no reference is made to the fault of the *Champagne* in not checking her speed, or the mention in said opinion of the fact that the order of the pilot, which he gave when the first whistle was blown, to check her speed, was not carried out.

Eighth Point.

In the eleventh paragraph of the Petition the petitioner attempts to set forth certain questions which it thinks are involved in this case.

a. The first question stated cannot properly be considered in this case, because the navigators of both vessels agreed in their understanding as to which rules were in operation at the time.

b. The remark in Judge Wallace's opinion that " each pilot supposed that the signal of the other was one given pursuant to the rules of the Supervising Inspectors," is not any statement of "another system involved" which would determine the controversy.

c. Inasmuch as the navigators of both vessels agreed in their understanding of the signals which were blown, the third question suggested cannot arise in the case.

d. The fourth question cannot arise in this case because there was no difference between the navigators of the two vessels as to the meaning of the whistles.

e. The fifth question cannot arise in the case for the same reason.

f. The sixth question is of no importance in the case, because the signals were exchanged by the vessels indicated, and were rightly understood by the pilot of the *Lisbonense* to indicate that the *Lisbonense* would cross ahead of the *Champagne*. and there was then abundance of time and room for the *Champagne* to go under her stern.

Ninth Point.'

In the thirteenth paragraph of said Petition, the petitioner claims to set forth certain errors of the Circuit Court of Appeals.

a. As to the first error claimed, the petitioner is under a mistake. The Court did apply the very rule it names. It decided, however, that the vessel to which the rule was applicable was the *Champagne* instead of the *Lisbonense*.

b. There is no foundation for the second suggestion of error. There is no possibility of finding, and it was not found, that the *Champagne* stopped and reversed when collision could have been avoided. On the contrary, she was found in fault because she did not stop and reverse until the collision could *not* be so avoided.

c. It is true that the Court of Appeals found the *Champagne* in fault in not further reducing her speed; but that, instead of being an error, was a correct decision. The pilot of the *Champagne*, when he whistled, gave the order to reduce her speed and supposed it was reduced, and if it had been reduced no collision would have occurred. Holding the *Champagne* in fault for not then reducing her speed is not any disregard of the rules, but in accordance with clearly established rules.

d. The case does not establish beyond doubt or contradiction that when *La Champagne* stopped and reversed, her manœuvre would have itself avoided the collision had the *Lisbonense* been on the course to starboard indicated by her whistle. On the contrary, the evidence establishes that the *Lisbonense was at that time* on the course to starboard indicated by her whistle.

e. The fifth alleged error has no foundation whatever. The evidence did not show that, when the *Champagne* stopped and reversed, collision could have been avoided by both vessels stopping and reversing, nor by the *Lisbonense* starboarding her helm and passing astern of the *Champagne*. On the contrary, it showed that, at that time, the situation of the vessels was such that if the *Lisbonense* had not kept on at full speed and put her helm hard-a-port, as she did, the collision would have been much more disastrous. The *Champagne* would have been struck on her starboard side by the *Lisbonense* and probably sunk.

Tenth Point.

In the fourteenth article of the Petition, the petitioner alleges that the finding of the Circuit Court of Appeals that "when *La Champagne* gave her answering signal to the *Lisbonense*, the former had already completed her manœuvre to starboard," is against the evidence in the case. Such finding, on the contrary, was in accordance with the evidence in the case. The answer of the *Champagne* had not averred that she did make a manœuvre to starboard after whistling, but averred that she could not safely manœuvre nor turn to the starboard. The captain of the *Champagne* testified that it was impossible for him to change his course. That the orders which he gave were to stop and go astern full speed; that *probably* "the pilot gave an order to port." Whereas the pilot testified positively that he gave no order to port; that the only orders that he gave after hearing the *Lisbonense's* whistle were to whistle, stop and reverse.

Eleventh Point.

As to the fifteenth article in the Petition, the facts were that on the day after the collision a report made by the captain of the *Champagne* containing a narrative of the collision *was served upon the master of the Lisbonense*, and that that paper closed by the statement of the master of the *Champagne* saying: "I hereby *protest* both in my name and in that of the Compagnie Generale Transatlantique against the English steamer *Lisbonense*," and it also added, "reserving to the master the right to present this *protest* against her captain and owners." This protest was not put in evidence on the trial in the District Court, but was offered on the trial in the Circuit Court of Appeals. On our part we respectfully submit that any action of that Court which would have excluded a statement of the facts of the collision made by the captain of either vessel within two days from the collision would have been "an innovation upon the law of evidence," and would have established "a dangerous precedent for the future."

Twelfth Point.

We have only felt it of importance in our Brief as to this Petition to speak of the case as far as the *Champagne* was concerned, reserving to ourselves, if anything should require, everything that might be said in reference to the navigation of the *Lisbonense.*

The above suggestions seem to us proper to be brought to the attention of the Supreme Court before it shall determine to grant thce ertiorari asked for.

SIDNEY CHUBB,
Proctor for Singlehurst, *et al.*
R. D. BENEDICT,
Advocate.

149 US 787

~~1311~~

Office Supreme Court U. S.
FILED.
MAY 1 1893
JAMES H. McKENNEY,
CLERK.

United States Supreme Court.

IN THE MATTER

of

The Petition of the SUN PRINTING AND PUBLISHING ASSOCIATION for a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Second Circuit in JULIETTE C. SMITH,

vs.

THE SUN PRINTING AND PUBLISHING ASSOCIATION.

PETITION.

FRANKLIN BARTLETT,
Of Counsel for Petitioner,
82 Times Building, New York City.

The Evening Post Job Printing House, New York.

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA: 1

The Petition of THE SUN PRINTING AND PUBLISHING ASSOCIATION, a corporation, by William M. Laffan, one of its trustees, for a writ of *certiorari* directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the case of Juliette C. Smith against The Sun Printing and Publishing Association.

The said petitioner respectfully shows to this Court as follows: 2

FIRST.—That the defendant is a corporation duly incorporated under the laws of the State of New York, and is engaged in the publication of two newspapers called *The Sun* and *The Evening Sun*, and that this action was brought to recover damages for an alleged libel published in *The Evening Sun* of June 13, 1890.

SECOND.—That the action was tried in the Circuit Court for the Southern District of New York before Judge Nathaniel Shipman and a jury in October, 1891, and on the 21st day of October, 1891, a verdict 3 was found by the jury in favor of the plaintiff for the sum of $7,500; that a bill of exceptions was subsequently filed and a motion for a new trial was

4 made before Judge Shipman, which motion was denied on or about the 8th day of March, 1892, and a writ of error from the judgment entered on the verdict was subsequently and in the month of April, 1892, taken by your petitioner to the United States Circuit Court of Appeals for the Second Circuit.

THIRD.--That lately and on the 18th day of April, 1893, in the Circuit Court of Appeals for the Second Circuit on the writ of error of your petitioner from the judgment entered on the verdict of the jury herein, said case was reviewed and determined by said Circuit Court of Appeals and a decision made 5 therein affirming the said judgment in all things, which decision is final; and said Court is about to remand this case to said Circuit Court with instructions to proceed in accordance with the decision of said Circuit Court of Appeals.

FOURTH.—That no mandate has been issued to the Circuit Court of the United States for the Southern District of New York directing that Court to proceed, but that the issue of such mandate has been stayed for the purpose of enabling your petitioner to present this petition to the Supreme Court of the United States for a *certiorari* of the cause.

6 FIFTH.—That hereto attached is a copy of the opinion rendered by Judge Lacombe, which has been marked Exhibit A.

SIXTH.—And your petitioner further avers that the present case is one in which it is proper for this Court to issue a *certiorari* for the following reasons:

I.—A grave jurisdictional question and one involving the rights of many citizens of the United

States is involved, because a controverted issue as to the citizenship of the plaintiff was not proven upon the trial of this action, and your petitioner believes that the decision of the United States Circuit Court of Appeals overruling the assignment of error on this point was contrary to the decision of the Supreme Court of the United States in the case of Artemus Roberts, plaintiff in error, against Walter F. Lewis, decided at the October Term in 1891, and reported in 144 U. S. Reports, page 653. 7

II.—There are also certain important questions as to the law of evidence which on the writ of error were decided adversely to your petitioner, and which your petitioner verily believes have been decided contrary to the settled law. 8

III.—The amount involved is large, to wit, $7,500 with interest and costs.

SEVENTH.—In the opinion of the United States Circuit Court of Apppeals rendered by Judge Lacombe, the Court says:

" Defendant contends that the Circuit Court had no jurisdiction of the case, because the requisite citizenship of the plaintiff did not appear of record.

It is averred in the first paragraph of the complaint that plaintiff 'is and always has been an honest, moral and loyal subject of Her Majesty Victoria, Queen of England, and as such has resided for a long time, and now resides at Toronto, Canada, &c.' The answer admits the residence at Toronto, but denies any knowledge or information sufficient to form a belief as to the other allegations set forth in said first paragraph. 9

John C. Smith, the plaintiff's husband, testified that he had 'lived in Toronto *all his life.*' If so he must have been born there, and

10 was therefore a British subject. The plaintiff
testified (on October 20, 1891,) that she had
been married to John C. Smith ‘nearly six
years" during which time she also resided there. By
her marriage her nationality became that of her hus-
band, and the evidence is quite sufficient to establish
the averments of the complaint, especially as no ob-
jection to its sufficiency was interposed at the trial."

Your petitioner avers that the fact that no objec-
tion to the sufficiency of the evidence was interposed
at the trial cannot cure a jurisdictional defect, and
that a question of jurisdiction such as that involved
in the citizenship of the parties cannot be waived
nor can the defendant be estopped from raising such
11 a question at any time. And your petitioner further
avers that the theory that because the plaintiff's hus-
band testified that he had lived in Toronto all his
life, he must have been born there, and was, there-
fore, a British subject, is merely an argument and
is not due proof of the citizenship of the plaintiff,
Juliette C. Smith. It is often the case that a per-
son born in one country is taken to another country
in early infancy, and yet lives all his life practically
in the new country, without being a citizen thereof
until naturalization papers are duly granted. Na-
tivity, not residence, determines citizenship in de-
fault of an application for naturalization.

12 Wherefore, your petitioner prays that this Honor-
able Court will be pleased to grant a writ of *certiorari*
to the Circuit Court of Appeals for the Second
Circuit, to bring up this case to this Honorable
Court, for such proceedings therein as to this Court
shall seem just, or to require this case to be certified
to this Supreme Court for its review and determina-
tion, pursuant to the power vested in it by the Act
of Congress entitled, "An Act to establish Circuit
Courts of Appeal, and to define and regulate in cer-

tain cases the jurisdiction of the Courts of the United States and for such other purposes." Approved March 3, 1891. 13

And your petitioner will ever pray. etc.

The Sun Printing and Publishing Association by William M. Laffan

Southern District of New York, ss.:

William M. Laffan, being duly sworn, says: That he is one of the trustees of the petitioner, and is the agent of the petitioner herein; that he has read the foregoing petition, and that the same is true to the petitioner's knowledge and belief. The reason why this verification is not made by the defendant is that it is a corporation. That deponent's knowledge is derived from the fact that he is the publisher and business manager of the defendant corporation. 14

Sworn to before me this 28th day of April, 1893. } William M. Laffan

Oscar P. Willmann
Notary Public N.Y. Co.

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court. 15

Franklin Bartlett
of Counsel for
petitioner

Exhibit A

16 U. S. CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

Before WALLACE, *C. J.*
LACOMBE, *C. J.*

JULIETTE C. SMITH,
Defendant in Error,

vs.

THE SUN PRINTING AND PUBLISHING ASSOCIATION,
17 Plaintiff in Error.

WRIT OF ERROR TO U. S. CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

LACOMBE, *C. J.*—Plaintiff is a married woman residing with her husband at Toronto, Canada. In the month of June her husband came to New York, and on the 8th of that month plaintiff left Toronto to join him there. By a prior arrangement between them she was accompanied on her journey by a Mr. Edward Rutherford of Toronto, a friend of her husband and herself. When the train arrived they
18 were met at the station by her husband.

On June 14, 1890, the following statement appeared in the *Evening Sun*, a daily paper published in the City of New York by the defendant:

"DID SHE GO WITH A HANDSOMER MAN?

"Reported Sensational Elopement in Canadian High Life.

"Toronto, Ontario, June 13th.—Society was ex-
" cited last night about the elopement of Mrs. Smith,

" the wife of one of the biggest merchants in 19
" Toronto, and Edward Rutherford, who belongs to
" one of the first families. He is a bachelor of
" thirty.

" For some time past their intimacy was freely
" spoken of and when both were missing, and no
" explanations were given, tongues wagged freely.

" A private dispatch from New York, received last
" night, said they were both seen in that city. Mr.
" Smith had paid no attention to the scandalous talk
" until the receipt of this message, when he at once
" started for New York. His friends say that he
" has not lost confidence in his wife, and that his ob-
" ject is to trace her actions in Montreal and Bos-
" ton." 20

The article was forwarded to the defendant in the regular course of business, by a news agency to which it was a subscriber, and was published without any effort at verification of its statements. Although it was admitted by the defendant that the charge therein contained—that plaintiff had eloped from her husband—was false, no retraction was ever published in defendant's paper.

Plaintiff brought her action for libel, and, upon a trial before Judge Shipman and a jury, recovered a verdict of $7,500. A motion was thereupon made to the trial Judge to set the verdict aside, which was denied. To review errors in the trial 21 below this writ of error was taken.

The general subject of the responsibility of proprietors of newspapers for libels such as this and published in the same way, was discussed by this Court in Rutherford *vs.* The Morning Journal, 2, C. C. A., 354, where the same libel (except for the head lines) was before the Court. It will only be necessary, therefore, to dispose of the several exceptions reserved in the case at bar and argued by the plaintiff in error.

22 1. Defendant contends that the Circuit Court had no jurisdiction of the case because the requisite citizenship of the plaintiff did not appear of record.

It is averred in the first paragraph of the complaint that plaintiff "is and always has been an honest, moral and loyal subject of Her Majesty Victoria, Queen of England, and as such has resided for a long time and now resides at Toronto, Canada, &c." The answer admits the residence at Toronto, but denies any knowledge or information sufficient to form a belief as to the other allegations set forth in said first paragraph.

John C. Smith, the plaintiff's husband, testified that he had "lived in Toronto *all his life.*" If so he 23 must have been born there, and was therefore a British subject. The plaintiff testified (on October 20, 1891) that she had been married to John C. Smith "nearly six years," during which time she also resided there. By her marriage her nationality became that of her husband, and the evidence is quite sufficient to establish the averments of the complaint, especially as no objection to its sufficiency was interposed at the trial.

2. Defendant contends that the Court erred in allowing one witness to answer the question "Did you know to whom the article (the libel) related when you read it?" and another to answer the question "Did you know to whom it alluded?" 24

Having answered these questions in the affirmative the witnesses were both asked to "state the reasons why they knew."

The defendant relies on the cases of Van Vechten *v* Hopkins, 5 Johns., 211; Maynard *v.* Beardsley, 7 Wend., and Gibson *v.* Williams, 4 Wend., 320, in which it is held that in an action for libel a witness should not be allowed to state his opinion as to whom he understood the defendant to mean; but must be strictly confined to a statement of facts,

from which it is for the jury, under direction of the 25
Court, to draw such inferences as may be warranted.
We do not deem it necessary in this case to enter
into any extended discussion as to the authority of
these cases and to what extent, if at all, a witness
who is not an expert may testify to his opinion or
judgment when said opinion is coupled with a statement
in detail of the facts and circumstances upon
which he founds it—an exception from the general
rule well recognized in certain cases. Conn.
Mut. Life Ins. Co. *v.* Lathrop, 111 U. S. 612.
In the case at bar, although the answer
denied that the article complained of was published
of or concerning the plaintiff, and averred that it referred
"to some other Mrs. Smith," there was prac- 26
tically no dispute as to the identity of the person referred
to. No evidence whatever was introduced to
show that there was any other Mrs. Smith to whom
the article could apply. It was testified by a witness
well acquainted with the parties and who had resided
in Toronto for twenty-nine years, that there was not
in 1890 any person in Toronto, other than the Edward
Rutherford above mentioned, to whom the
article could relate, or who in any way answered the
description contained in the article, and that there
was not at the time mentioned in Toronto any Mrs.
Smith, other than the plaintiff, who was known to
be on terms of intimate acquaintance with the said
Edward Rutherford. To this evidence defendant did 27
not object. Irrespective entirely of all testimony as
to the opinions of witnesses, there was evidence,
wholly uncontradicted and unquestioned, of facts
which abundantly established the identity of plaintiff
with the Mrs. Smith named in the libel. In the
absence of any evidence showing the existence of
any other Mrs. Smith to whom the article might apply,
the circumstance that plaintiff was the Mrs.
Smith who early in June went from New York to
Toronto with Edward Rutherford was quite sufficient

28 to warrant the conclusion that she was the individual referred to as an eloping wife. In this view defendant upon the trial seems to have concurred, for he took no exception to the charge of the Court that there was "no room for doubt that the plaintiff was the Mrs. Smith to whom the defamatory publication referred and concerning whom the libel was uttered by its original author;" and that the only question in real and actual dispute is the question of damages.

If then the admission of the opinions of the two witnesses above referred to was error, it did not prejudice the defendant. Perfectly competent evidence, to which no objection was interposed so abundantly
29 established the affirmative of that issue against the defendant that the Court was justified in taking it from the jury—as it practically did—and the objectionable evidence which was confined to this issue could not have operated to the defendant's detriment upon their minds.

3. The exceptions argued in defendant's fifth, eighth, ninth and tenth points may be disposed of in like manner; they all relate to the admission of testimony bearing on the question of identity. If every item of testimony thus objected to were thrown out there would be sufficient left in the case, in the absence of a scintilla of evidence that the ar-
30 ticle was intended to apply to any one else, to warrant a Court in instructing the jury that upon the question of identity the plaintiff had made out her case by undisputed testimony. Therefore if all defendant's objections above enumerated were sound, the admission of the evidence they cover has worked no prejudice.

4. The defendant also excepted to the admission of testimony by the plaintiff as to an arrangement alleged to have been made between her husband

and Mr. Rutherford prior to her starting for New 31
York; the witness not being present when such arrangement was made. This was hearsay and improperly admitted, but as the husband subsequently of his own knowledge testified without objection to the same arrangement, which is in no ways disputed or controverted by other proof, we are at a loss to see wherein the defendant has been prejudiced by the error complained of.

5. Defendant further contends that the Court erred in excluding testimony as to other suits having been brought against other newspapers.

This objection is unsound; such evidence was
wholly irrelevant and immaterial; it was not even 32
suggested that any other suit was ever brought against any one for the libel counted upon in the action at bar. That other newspapers which published similar libels had been prosecuted by the plaintiff for *their* acts, was a matter with which neither court nor jury had any concern.

6. Equally unsound is the exception to evidence as to who wrote the article complained of.

Defendant insists that it was admissible to rebut any presumption of malice. It was conceded, however, that the article was not prepared by the defendant, but came to it regularly in due course of
business from a reputable news agency upon which 33
it was in the habit of relying for accuracy, and that it published the article relying upon the source from whence it came. And the Court charged that those were circumstances which were "fairly to be taken in mitigation of the act of the defendant;" and that the plaintiff had not proved any actual malice or personal ill-will on the part of the defendant. Under these circumstances it could have in no way prejudiced defendant that it

34 was prevented from showing the identity of the original liar.

7. The exception as to the exclusion of evidence as to the previous life of the plaintiff was withdrawn upon the argument.

8. The defendant further contends that there was error in the charge to the jury. The law, as laid down by the Court, is in substantial accord with the opinion of this Court in Rutherford *v.* Morning Journal, 2 C. C. A., 354.

The particular portions of the charge excepted are these:

35

(*a.*) "The law, therefore, as it is frequently said, implies malice."

This was a perfectly correct statement of the law, and was followed by an equally correct statement of the distinction between actual and implied malice, and of the rule of law to be applied in actions for libel, where no actual malice or personal ill-will is shown. And the jury was charged expressly that plaintiff had produced no evidence to show any personal ill-will. The exception is therefore unsound.

(*b.*) "As in this case there was no evidence of
36 actual pecuniary loss, she is entitled, unless the evidence in support of mitigation of damages is such as to satisfy you that a substantial amount ought not to be given to such damages as she sustained in her feelings and her reputation by reason of the publication of the libelous article."

(*c.*) "She, a married woman, was charged positively, in a sensational manner, and in a somewhat jeering manner with having eloped with a man, her previous intimacy with whom, it was further said, had been freely spoken of in the city of her residence." 37

(*d.*) "It was a bold, positive and sensational statement of her disgrace as a married woman."

(*e.*) "It charged an act of the greatest dishonor to a wife, and one which, if true, is well-nigh remediless."

(*f.*) "It was calculated to cause great injury to her reputation" and was a "most damaging article."

We do not understand that defendant contends that these excerpts from the charge contain any 38 misstatement of the law. He objects to them as being comments on the facts, and calculated to prejudice defendant's case with the jury.

It is well settled law that a Court of the United States in submitting a case to the jury may express its opinion on the facts. Lovejoy *v.* U. S., 128, 171; U. S. *v.* Phil. & R. R. R., 123 U. S., 113; Simmons *v.* U. S., 142 U. S., 148.

That the comments in this particular case were harsh is manifestly due to the circumstance that the facts in the case were what they were. We do not see in the quotations above any misstatement as to the contents of the libel, any characterization of its terms, which its own language did not fully warrant, 39 any comment upon it which was at all unfair. The trial Judge might if he pleased have refrained from any comment at all, but when, in his discretion, he decided to express an opinion as to the libel, it is not easy to perceive how he could have said much less.

(*g.*) "If you think that the fact that the article was received, in the ordinary course of business, from a reliable and unusually correct news agency

40 is sufficient to excuse the defendant from the duty of investigation, of inquiry, of delay for the sake of accuracy before it published this most damaging article, then you will not give punitive damages."

(*h.*) "If you think * * * that the defendant was guilty of reprehensible negligence in publishing the article without further attempts to verify its truth, then you are justified in giving such a reasonable sum in damages as shall be an example to deter against similar future negligence."

These were perfectly correct statements of the law (Rutherford *v.* Morning Journal, *supra*), and the exceptions taken are unsound.

41 (*i.*) As was said in a similiar case in this Court: It is impossible to arrive by any arithmetical calculation at the amount of damages to which she is entitled on this account.

This also was a truthful statement, and the jury being further instructed that they were to compensate for the *actual* injury caused, and that, while the amount was in their control, the amount given "should be reasonable and should be just," defendant's exception is clearly unsound.

9. It is further contended that the Court erred in refusing to charge defendant's second, third, fourth, fifth, eighth, tenth and eleventh requests. These
42 may be briefly deposed of.

"SECOND.—There is no proof in this case of any publication of the article complained of in the City of Toronto, Canada, the home of the plaintiff.

"THIRD.—The fact that there is no proof of publication of the libel at the home and residence of the plaintiff, should be taken into consideration in the fixing of damages."

The Court did instruct the jury that "The article * * * was not published in Toronto, and so far as it is known there are no people in Toronto who habitually take the paper, and it is not displayed upon the news-stands." Why, when the Court charged upon the question of publication in Toronto more strongly in favor of defendant than the language of its request asked, counsel nevertheless excepted and presents such exception here as a ground for reversal is a mystery, which his brief does not elucidate. The fact of non-publication in Toronto was enumerated in the charge with the other facts which were laid before the jury as bearing upon the question of the measure of plaintiff's damages. That is all the defendant was entitled to. 43 44

"FOURTH.—The only persons who have read the article in question, according to the testimony of the plaintiff's witnesses, have been persons who are intimate friends of the plaintiff and knew that the charge in said article contained was not true."

In view of the testimony brought out on the cross-examination of the witness Thwaite it would have been error for the Court to have charged in the language of this request.

"FIFTH.—There has been no evidence in this case tending to show any actual damage to the plaintiff by the publication of the alleged libel." 45

The Court charged that there "was no evidence of actual pecuniary loss." The defendant was not entitled to a charge in the language of the request. When publication of an article libelous *per se* is proved, and the falsity of its statements shown, the law presumes an injury to reputation and feelings which is actual damage even though no special damage be shown (Bergmann *v.* Jones, 94 N. Y., 51).

46 "**Eighth.**—It appears from the uncontradicted evidence that the article complained of was received by the *Evening Sun* from the United Press, a news agency in good standing which supplies newspapers with items of news, and which regularly supplies the *Evening Sun* with such items and that the *Evening Sun* published the article in question, relying on its authenticity and the credit to which it was entitled coming from such a course, and these circumstances should fairly be taken in mitigation."

The Court substantially so charged.

"**Tenth.**—The general conduct of the public press has nothing to do with this case."

47

"**Eleventh.**—Whether a newspaper is published by a corporation or an individual it matters not."

These abstract propositions are correctly stated, but there is nothing in the record to show that such instructions were so material to a proper consideration of the case by the jury as to make it error in the Court to decline to charge them.

10. There is nothing to show that the verdict was, as defendant contends, the "result of passion and prejudice." When the proper rule for the computation of damages has been given to the jury, a verdict 48 cannot be set aside as excessive in the Federal courts upon a writ of error (Railroad Co. *vs.* Winter's Admr., 143 U. S., 60; Hogg *v.* Emerson, 11 How., 587). Nor is a decision upon a motion for a new trial the subject of review in a Federal appellate court (Laber *v.* Cooper, 7 Wall., 565; Railway Co. *v.* Heck, 102 U. S., 120). The defendant's eighteenth, nineteenth, twenty-first and twenty-second assignments of error are therefore unsound.

The judgment of the Circuit Court is affirmed. 49

(Endorsed)—U. S. Circuit Court of Appeals.—The Sun Printing and Publishing Association *vs.* Juliette C. Smith.—Opinion —United States Circuit Court of Appeals, Second Circuit.—Filed Apr. 18, 1893.—John A. Shields, Clerk.

149 US 787

Evening Post Job Printing House—N. Y.

Office Supreme Court U. S.
FILED.
MAY 1 1893
JAMES H. McKENNEY,
CLERK.

United States Supreme Court.

In the Matter
of
The Petition of the Sun Printing and Publishing Association, for a writ of certiorari, to review the decision of the United States Court of Appeals for the Second Circuit, in Juliette C. Smith *vs.* The Sun Printing and Publishing Association.

First Point.

The citizenship of the plaintiff was not proved upon the trial, and because of this failure of proof there was no jurisdiction in the Circuit Court.

The jurisdiction of the United States Circuit Court in this action depends upon the citizenship of the parties, and the requisite citizenship of the plaintiff must be alleged and appear of record, and such citizenship, if denied, must be proved. The complaint, in its first paragraph, alleges that "she, the plaintiff, is and has always been an honest, moral and loyal subject of Her Majesty Victoria, Queen of England, and as such has resided for a long time and now resides at Toronto, in the Province of Ontario, in the Dominion of Canada," &c.

(Record, p. 4, fol. 11.)

The first paragraph of the amended answer admits that the plaintiff resides at Toronto, in the Province of Ontario, in the Dominion of Canada, but denies any knowledge or information sufficient to form a belief as to the other allegations set forth in the first paragraph of the complaint, thus denying, among other things, that the plaintiff was a subject of Her Majesty Victoria, Queen of England.

(Record, pp. 7 and 8, fols. 21 and 22.)

Under the rules of pleading in the State of New York, the denial contained in the first paragraph of the answer is a denial of the citizenship of the plaintiff, and she was bound upon the trial to prove such citizenship, which she failed to do. For this reason there is a defect of jurisdiction, and such jurisdictional defect cannot be cured. Upon this point we respectfully cite the case of *Artemus Roberts, plaintiff in error*, v. *Walter F. Lewis*, reported in 144 United States Reports, 653.

"Mr. Justice Gray delivered the opinion of the Court:

The principal question argued in this case is upon the true construction of the devise of Jacob Dawson to his wife, in view of the conflicting decisions of this Court and of the Supreme Court of Nebraska. *Giles* v. *Little,* 104 U. S., 291 (26: 745); *Little* v. *Giles,* 25 Neb., 313. See also *Little* v. *Giles,* 118 U. S., 596 (30: 269); *Giles* v. *Little,* 134 U. S., 645 (33: 1062).

But a preliminary question to be decided is whether the Circuit Court of the United States appears upon this record to have had any jurisdiction of the case.

The petition or declaration alleges in due form that the plaintiff is a citizen of the State of Wisconsin, and the defendant is a citizen of the State of Nebraska; and further, alleges that the plaintiff has a legal estate in and is entitled to the immediate possession of certain lots in Lancaster County in the State of Nebraska, and the defendant has kept and still keeps the plaintiff out of possession thereof; wherefore the plaintiff prays for judgment for delivery of possession of the premises to him. The answer sets up two defenses: 1st. Open and adverse possession of the premises by the defendant for ten years; 2d. A general denial of each and every allegation in the petition. The special verdict finds facts bearing on the merits of the case, but nothing as to the citizenship of the parties.

Whenever the jurisdiction of the Circuit Court of the United States depends upon the citizenship of the parties, it has been held from the beginning that the requisite citizenship should be alleged by the plaintiff, and must appear of record; and that when it does not so appear this Court, on writ of error, must reverse the judgment, for want of jurisdiction in the Circuit Court. *Brown* v. *Keene*, 33 U. S., 8 Pet,, 112 (8: 885); *Continental Ins. Co.* v. *Rhoads*, 119 U. S., 237 (30: 380).

Doubtless, so long as the rules of pleading in the courts of the United States remained as at common law, the requisite citizenship of the parties, if duly alleged or apparent in the declaration, could not be denied by the defendant, except by plea in abatement, and was admitted by pleading to the merits of the action. *Sheppard* v. *Graves*, 55 U. S., 4 How., 505 (14: 518).

But since 1872, when Congress assimilated the rules of pleading, practice, and forms and modes of procedure in actions at law in the courts of the United States to those prevailing in the courts of the several States, all defenses are open to a defendant in the Circuit Court of the United States, under any form of plea, answer or demurrer, which would have been open to him under like pleading in the courts of the State within which the Circuit Court is held. Act of June 1, 1872, Chap. 255, Sec. 5; 17 Stat., 197; Rev. Stat., Sec. 914; *Chemung Canal Bank* v. *Lowery*, 93 U. S., 72 (23: 806); *Glenn* v. *Sumner*, 132 U. S., 152 (33: 301); *Cen-*

tral Transp. Co. v. *Pullman Palace Car Co.*, 139 U. S., 24, 39, 40 (35: 55, 61).

By the Nebraska Code of Civil Procedure, Sec. 62, every civil action is commenced by petition; and by Sec. 92, the petition must contain "the name of the Court and county in which the action is brought, and the names of the parties, plaintiff and defendant," "a statement of the facts constituting the cause of action" and "a demand of the relief to which the party supposes himself entitled." By Sec. 94 the defendant may demur to the petition for certain matters appearing on its face, among which are "that the Court has no jurisdiction of the person of the defendant, or the subject of the action," and "that the petition does not state facts sufficient to constitute a cause of action;" and by Sec. 95, the demurrer must specify the grounds of objection, or else be regarded as limited to the latter ground only. By Sec. 96, "when any of the defects enumerated in Sec. 94 do not appear upon the face of the petition, the objection may be taken by answer;" and in every case, by Sec. 99, the answer must contain "a general or specific denial of each material allegation of the petition controverted by the defendant," and "a statement of any new matter constituting a defense."

Under this Code, as under the Code of New York, upon which it was modeled, the answer takes the place of all pleas at common law, whether general or special, in abatement or to the merits; and a positive denial in the answer of "each and every allegation in the petition" puts in issue every material allegation therein, as fully as if it had been specifically and separately denied. *Sweet* v. *Tuttle*, 14 N. Y., 465; *Gardner* v. *Clark*, 21 N. Y., 399; *Donovan* v. *Fowler*, 17 Neb., 247; *Hassett* v. *Curtis*, 20 Neb., 162; Maxwell, Practice (4th Ed.), 127, 128; Bliss, Code Pleading (2d Ed.), Sec. 345. And by express terms of §§ 94, 96, above cited, an objection that the Court has no jurisdiction, either of the person of the defendant, or of the subject of the action, may be taken by demurrer if it appears on the face of the petition, and by answer if it does not so appear. The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and, like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff The record showing no proof or finding upon this essential point, on which the jurisdiction of the Circuit Court depended, the judgment must be reversed, with costs, for want of jurisdiction in the Circuit Court, and the case remanded to that Court, which may, in its discretion, either dismiss the action for want of jurisdiction, or set aside the verdict and permit the plaintiff to offer evidence of the citizenship of the parties. *Continental Ins. Co.* v. *Rhoads*, 119 U. S., 237 (30: 380):

Judgment reversed, and case remanded to the Circuit Court for further proceedings in accordance with the opinion of this Court."

Judge Lacombe says in rendering the opinion of the United States Circuit Court of Appeals, that "the evidence is quite sufficient to establish the averments of the complaint, especially as no objection to its sufficiency was interposed at the trial."

The jurisdiction of the Circuit Court depended upon the material allegation that the plaintiff was a subject of the Queen of England, and this allegation having been put in issue by our answer, should have been proved by the plaintiff. If not proved it was a jurisdictional defect which cannot be cured in any way, and the plaintiff's citizenship could only be proved by competent evidence, and the competency of the evidence would not in any degree depend upon the question whether objections to its sufficiency were interposed or not at the time of the trial of the action. It either was or was not shown on the trial that the plaintiff was a subject of Queen Victoria or a Canadian citizen, and we respectfully submit that there is no evidence on that point, but merely the testimony of the plaintiff's husband that he lived in Toronto all his life. From this statement the inference is drawn or the argument is made that he must have been born there, and was, therefore, a British subject. If this sort of evidence were admitted as to proof of citizenship, it would in the

City of New York obviate the necessity in thousands of cases of application in the courts for naturalization. For thousands and thousands of persons are brought across the Atlantic annually in early stages of infancy, and yet those very same persons, when becoming adults, would doubtless state that they had lived all their lives in the City of New York, not taking into consideration, of course, the few months which followed their birth or their nativity. The expression which is often heard, "I have lived all my life in this town," does not necessarily mean that the person making use of such an expression was born in the town; it merely means (and is so used habitually) that the individual speaking has practically passed nearly the whole of his existence up to that time in the particular locality mentioned. It is a matter of frequent observance that persons will be heard to say, "I was born in Massachussetts, but I have lived all my life in New York," or "I was born in Ireland, but I have lived all my life in New York;" so it is respectfully urged that the statement of the plaintiff's husband that he had lived in Toronto all his life does not in any way constitute proof of the plaintiff's citizenship or of her husband's citizenship. A jurisdictional defect, in the absence of proof, cannot be waived, nor can the defendant be estopped from raising it at any time.

Second Point.

The trial Court erred in admitting the testimony of the witnesses Thwaite and Bradburn as to their opinion of the article.

The witness Thwaite was asked:

"Did you know to whom the article related when you read it?"

> Objected to as incompetent, irrelevant, immaterial and improper. Objection overruled and defendant excepts.

A. Yes.
Q. State the reasons why you knew?

> Same objection, ruling and exception."

Record, pp. 26-27, fols. 78-79.

The witness Bradburn was asked the question :
" Did you know to whom it alluded?

> Objected to as incompetent, irrelevant and improper. Objection overruled and defendant excepts.

A. I did."

Record, pp. 29-30, fols. 87-88.

Judge Shipman in his decision denying the motion for a new trial said :

"The witnesses in this case to whose testimony exception was taken were not asked to whom, in their opinion or within their knowledge, the article applied. They were asked if they knew to whom the article applied, to which they replied, 'Yes,' and were then asked to give the reason why they knew—in other words, to state the facts and circumstances which showed who was pointed at by the publication. The testimony was not objectionable under the rule which excludes the opinion or conclusions of a witness."

Record, p. 63, fol. 187.

This testimony was important on the question of identity, and it prejudiced the case of the defendant. It should have been excluded, and its admission was error. Judge Shipman said that the witnesses were not asked to whom, in their opinion or within their knowledge, the article applied. They were asked if they knew to whom the article applied. There is no difference in asking a witness to whom within his knowledge an article applied, or asking him if he knows to whom the article applied, because what he knows must be within his knowledge, and the expressions are equivalent. The witnesses could not have known to whom the article related or to whom it alluded. Their testimony on such a point was necessarily only inference, or opinion, or deduction. Each witness was practically allowed to testify to whom he applied the article, when such testimony, according to the decisions in this State, cannot be given.

In *Van Vechten* v. *Hopkins*, reported in 5 Johnson, 211, Judge Van Ness on page 225 said:

" There is another point in the case upon which, in the view I have taken of the subject, it would not be necessary for me to express an opinion. As it may, however, embarrass the parties on a future trial (if there should be any), it may as well be disposed of. I allude to the exclusion by the Judge of the testimony of the witness who was called to say that from reading the libel, he applied it to the plaintiff. This evidence was properly overruled. The intention of the defendant is not the subject of proof by witnesses in the way here attempted. It is the mere opinion of the witness which cannot and ought not to have any influence upon the verdict. I consider the evidence as inadmissible because it goes to prove the correctness of an innuendo. This kind of evidence, I know, has frequently, though I think erroneously, been admitted at *nisi prius*. From what has been said before of the nature and use of an innuendo, technically so called, it is clear that it cannot be the subject of proof by witnesses. Not so of an averment and colloquium, which introduce into the pleading extrinsic matter, which is the proper subject of proof. This is fully stated by Mr.

Pollexfen, who was afterwards Chief Justice of the Common Pleas, in his able argument in Rosewell's case (3 St. Tr., 1058, 1059). 'I never knew,' says he, 'an innuendo offered to be proved;' and his doctrine was admitted both by the Court and by the Attorney-General, in his reply.

My opinion, therefore, is that the nonsuit should be set aside, and a new trial be awarded.

Kent, *Ch. J.*, Thompson, *J.*, and Yates, *J.*, were of the same opinion."

Same Case, pp. 225-226.

In *Maynard* v. *Beardsley*, 7 Wendell, 561, the fourth head note reads:

"In an action for a libel it is not admissible for a witness to state his understanding or construction of the publication; he can testify only to facts and not to his opinions or conclusions."

Chancellor Walworth, in rendering the opinion, said: "The publication set out in the declaration of the plaintiff below, taken in connection with the facts disclosed on the trial, unquestionably imputes to him official misconduct, and is therefore libelous. This being a question of construction for the Court and jury after the facts had been ascertained, it was not competent for the defendant to call witnesses and ask them how they understood the publication; for thus the witnesses would be constituted the judges both of law and fact, instead of the tribunal organized for that purpose. I consider this question as having been settled in our courts more than twenty years since in the case of Van Vechten *v.* Hopkins (5 Johns. R., 211). And it probably would not again have been raised here but for the remarks of a recent writer on the law of evidence (2 Starkie, 861). Mr. Starkie's observations are unquestionably founded upon the loose practice sometimes adopted at *nisi prius*, and which is alluded to by Judge Van Ness (5 Johns. R, 226). When the defendant does not seriously mean to contest the applicability of the libel to the plaintiff, the general question is frequently asked, whether from reading the libel, the witness applied it to the plaintiff, without calling upon him to state the facts and circumstances in detail, from which the jury might see that it was intended to be so applied; but I am not aware of any case in which such general questions have been permitted to be answered, if objected to by the adverse party. The witness must state the facts on which such an opinion might be founded, and leave it to the Court and jury to draw the conclusion."

Same Case, p. 562.

In *Gibson* v. *Williams*, 4 Wendell, 320, Judge Sutherland, in rendering the opinion of the Court, said:

"The testimony of Bigelow and Foley as to whom they understood the defendant to mean by the infamous thief, &c., was properly excluded. Mr. Starkie, in his Treatise on Evidence (2d Vol., 861), seems to consider this species of evidence as admissible. He says the colloquium and other averments, which connect the words or libel with the plaintiff or subject, must next be proved. This is usually done, he remarks, by the testimony of one or more witnesses, who know the parties and the circumstances, and who state their opinion and judgment as to the intention of the defendant to apply his words or libel to the party or circumstances as alleged. It seems to be sufficient, he continues, if the witness in the first instance state his general belief and opinion as to the defendant's meaning, without disclosing his reasons, leaving it to the defendant, if he think proper, to inquire as to the grounds and reasons which support that conclusion. Mr. Starkie cites no case as authority in support of these positions, and it is believed that none can be found; nor is the doctrine asserted, as far as

I have been able to discover, by any other writer upon the law of libel or the rules of evidence. It is an elementary principle in the law of evidence that the understanding and opinions of witnesses are not to be received except in matters of science, and a few other special cases, resting upon peculiar circumstances (McKee *v.* Nelson, 4 Cowen, 355; Murray *v.* Bethune, 1 Wendell, 196). It is the business of witnesses to state facts, and it is the province of the jury, under the direction of the Court, to draw such inferences or conclusions from those facts as in their judgment they will warrant.

In *Van Vechten* v. *Hopkins* (5 Johns. R., 211), the plaintiff offered a witness to prove that from reading the libel he applied it to the plaintiff, and understood him to be the person intended. This evidence was overruled by Judge Spencer, who tried the cause, on the ground that it was the province of the Court to determine, from a perusal of the libel, whether it was intended to apply to the plaintiff or not. Upon a motion for a new trial, it was held that whether the libel was published of and concerning the plaintiff was a question of fact which belonged to the jury and not to the Court to decide. But it was also held that the evidence was properly excluded, and the Court remarked that the intention of the defendant is not the subject of proof in the way here attempted. It is the mere opinion of the witness, which cannot and ought not to have any influence upon the verdict; and the Judge who delivered the opinion of the Court observed that this kind of evidence had, he believed, frequently, though he thought erroneously, been admitted at *nisi prius*. It is true that in that case there was no express averment that the plaintiff was the person to whom the defendant intended to apply the charge; but it is obvious that if there had been it would not have altered or affected the views of the Court to which I have adverted. If there had been such an averment, then the plaintiff might have introduced evidence in its support, for an averment may be proved, an innuendo cannot. But an averment must be proved by competent evidence, and not by the opinions or understanding of witnesses."

Same case, pp. 326-327.

"On a trial for defamation, it is not competent to prove that the words were 'spoken of and concerning' the plaintiff. The innuendo cannot be aided by the opinion of the witness, as to the person meant by the defendants."

Supreme Court of Pensylvania in
Rangler v. *Hummel*, 37 Penn. State
Reports, p. 130.

There Judge Thompson said:

"The next assignment of error we are reluctantly obliged to sustain. It was not competent to prove the special averment that the words were 'spoken of and concerning' the plaintiff, and thus aid the innuendo by the opinion of the witness, that the defendant meant the plaintiff in the words used. If this could be done there would be no use for an innuendo. Its office would be supplied by the oath of witnesses, who would draw the inference from precedent facts instead of the jury. This is not permissible. In Van Vechten *v.* Hopkins, 5 Johns. R., 225, it was decided that this kind of evidence could not be permitted. That was for a libel. But in Gibson *v.* Williams, 4 Wend., 320, a case of oral slander, the same doctrine was applied, and Van Vechten *v.* Hopkins cited and approved; Sutherland, *J.*, taking occasion to notice Mr. Starkie's contrary doctrine, in Vol. 2, p. 861, on Evidence, remarked that 'he,' Mr. Starkie, 'cites no authority in support of his position, and it is believed none can be found.'

The case of Snell *v.* Snow, 13 Metcalf, 278, follows the New York cases. So, also, is the note to Van Vechten *v.* Hopkins, 1 Smith's Leading Cases, 133. So in Hays *v.* Brentz, 4 Watts, 392; this last case is cited and approved by Gibson, *C. J.*

The case of The Commonwealth *v.* Buckingham, Thach. Crim. Cas., 29, the only additional authority to that of Mr. Starkie cited by the defendant in error, is scarcely to be considered such. The question was ruled on an offer of testimony without discussion, and never renewed afterwards. We are all of opinion that the Court below erred in the admission of the evidence which forms the subject of this bill of exceptions. The rule of law is too well settled to permit a doubt about it, that it is the business of witnesses to state facts, and the province of the jury to draw such inferences or conclusions from them as they shall conscientiously believe to be warranted. This rule was violated in the reception of the opinion of the witness, and for that reason only the case must be reversed.

Judgment reversed, and *venire de novo* awarded" (pp. 133–134).

The same rule of law was followed thirteen years later by the Supreme Court of Pennsylvania in the case of *McCue* v. *Ferguson*, 73 Penn. State Reports, p. 333, where the first head-note reads:

"It is not competent in slander to prove by the opinion of the witness the averment that words spoken in the third person were spoken of the plaintiff."

There Judge Sharswood said:

"It was certainly settled in Rangler *v.* Hummel, 1 Wright, 133, that in an action of slander it is not competent to prove the averment that the words were 'spoken of and concerning the plaintiff,' and thus aid the inuendo by the opinion of a witness that the defendant meant the plaintiff in the word used. The authorities relied upon were Van Vechten *v.* Hopkins, 5 Johns., 235; Gibson *v.* Williams, 4 Wend., 320, and Snell *v.* Snow, 13 Metcalf, 278."

In *Snell* v. *Snow*, 12 Metcalf, 282, the Court said:

> "The Judge very properly decided that the witness might testify to any existing facts or circumstances, to which the defendant alluded and referred, if any; but, having given the whole conversation, it was for the jury to determine what was meant by the language used, and that it was not competent for the witness to testify to his understanding of the defendant's meaning in the language used."

Mr. Townsend, in the third edition of his work on Slander and Libel, at page 176, in a note, says:

> "In New York a witness is not allowed to state his conclusion from the facts as to the intention of the defendant to apply the words or libel to the party or circumstances as alleged (*Van Vechten* v. *Hopkins*, 5 Johns., 211; *Gibson* v. *Williams*, 4 Wend., 320)."

The rule laid down in *Van Vechten* v. *Hopkins* has alway remained the law of the State of New York, and a witness cannot give his opinion or understanding to prove the identity of an individual or to prove that the statements complained of referred to the plaintiff.

Third Point.

The Court erred in admitting the testimony of the plaintiff as to the arrangement alleged to have been made between her husband and Mr. Rutherford prior to her starting to New York, and the Court erred in refusing to strike out such testimony.

Record, p. 16, fols. 46, 47.

Wharton on Evidence, Section 175, says:

"Hence we may hold the rule to be that the extra-judicial statements of third persons cannot be proved by hearsay unless such statements were part of the *res gestæ*, or made by deceased persons in the course of business, or as admissions against their own interest. In this sense as hearsay are to be considered the statements of a person not a party to the suit, as to his motives, when such statements are no part of the *res gestæ*, but are offered for the purpose of proving the motive of the act; the opinion of others as to the wealth and status of an individual."

The evidence of the plaintiff Juliette C. Smith as to those conversations which took place between her husband and Rutherford, not in her presence, is certainly incompetent as being hearsay evidence.

"Q. State whether or not it had been arranged prior to your starting for New York, between your husband and yourself and Mr. Rutherford, that you should make the trip to New York?

Objected to as immaterial and irrelevant.

Objection overruled and defendant excepts.

A. It had been arranged by my husband that Mr. Rutherford was to bring me to New York to meet him here.

Defendant's counsel moves to strike out the answer unless it appears that it comes within the witness' own knowledge.

Q. Did your husband say anything to you about your coming to New York with Mr. Rutherford?

A. Yes; my husband spoke to Mr. Rutherford about taking care of me, bringing me down here to meet him.

Q. Did he tell you about it?

A. Yes; it was arranged before Mr. Smith left Toronto.

Mr. Bartlett: I renew my motion to strike out, as not being within the knwledge of the witness."

(Record, p. 16, fols. 46, 47.)

The defendant was necessarily prejudiced before the jury by the admission of this testimony, and it was not fair to bind the defendant by any secret alleged plan made between the plaintiff, her husband and Mr. Rutherford before she started for New York. Such testimony was immaterial and irrelevant, and it inevitably tended to prejudice the defendant's case with the twelve men in the box. Moreover, the witness' statement as to what her husband told her about his conversation with Mr. Rutherford was clearly incompetent and improper, as not being within her knowledge and being merely hearsay testimony, and the motion to strike it out should have been granted.

Fourth Point.

The trial Court erred in not granting the motion of defendant's counsel to strike out the testimony of Juliette C. Smith as to what her husband said to her on the subject of a pre-arrangement.

We refer to the following testimony:

"Q. State what your husband did say to you on that subject?

A. The first arrangement was that I should come to New York with Mr. Smith, but he was called to Montreal on business and could not come with me. So he asked Mr. Rutherford, as he was coming down, to bring me here to meet my husband in New York, as my husband did not like to have me come alone.

Q. Did he so tell you?

A. Yes, he told me so.

> Defendant's counsel moves to strike out this testimony on the ground that it did not take place in the hearing of the witness. Motion denied, and defendant excepts."
>
> (Record, pp. 16, 17, fol. 48.)

We know of no rule of evidence which makes such testimony as the above competent or proper.

Fifth Point.

The trial Judge erred in his denunciation of the article in his charge to the jury, because such denunciation prejudiced the defendant, especially as to the amount damages.

We refer to the following portions of the charge:

(*c*.) "She, a married woman, was charged positively, in a sensational manner, and a somewhat jeering manner, with having eloped with a man, her previous intimacy with whom, it was further said, had been freely spoken of in the city of her residence."

(Record, p. 57, fols 169, 170.)

This virtual summing up in behalf of the plaintiff and denunciation of the defendant's course was calculated to prejudice and did prejudice the defendant greatly before the jury.

(*d.*) "It was a bold, positive and sensational statement of her disgrace as a married woman."

(Record, p. 57, fols. 169, 170.)

In this portion of the charge the Court transcended the limit of judicial discretion.

(*e.*) "It charged an act of the greatest dishonor to a wife, and one which, if true, is well nigh remediless."

(Record, p. 57, fols. 169, 170.)

This portion of the charge was virtually an instruction to the jury that any damages given by the jury, however large, could not compensate for the injury to the plaintiff. And this portion of the charge which stated to the jury and assumed that which did not appear in the evidence greatly prejudiced the defendant before the jury.

(*f.*) "It was calculated to cause great injury to her reputation."

(Record, p. 57, fol. 171.)

This portion of the Court's charge was the virtual instruction to the jury to mulct the newspaper in the largest possible amount. Exceptions were duly taken to these portions of the Judge's charge.

(Record, pp. 59, 60, fols. 177, 178.)

The rule is that the Judge may comment on the facts, but an analysis of the cases fails to show that the Judge is authorized to indulge in invective against the defendant.

In *Simmons* v. *United States*, 142 U. S., p. 148, the Judge said:

" Whenever in the opinion of the Court the testimony is convincing, it is the duty of the Court to hold the jury together. Therefore I must decline your request to be discharged." This was held not error. 142 U. S., p. 151.

In *Lovejoy* v. *United States*, 128 U. S., p. 171, the Court instructed the jury as follows:

" As to the signature of Thomas W. Means, I think you may have some difficulty in finding that it was a forgery. Of course, it is not my place to express an opinion, or say whether or not I think it is genuine. All I say is that you must examine the matter carefully and fully, and weigh all the testimony that bears upon the subject, and if you can say that his signature is a forgery it is for you to do so." " It seems to me, after you take these signatures and compare them fully, and examine all the testimony that seems to have any bearing on that question, that you cannot have much difficulty in coming to a correct conclusion."

128 U. S., p. 172.

There Mr. Justice Gray in rendering the opinion of the Supreme Court, said:

" It is established by repeated decisions that a Court of the United States, in submitting a case to the jury, may, at its discretion, express its opinion upon the facts, and that such an opinion is not reviewable on error, so long as no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury " (p. 173).

The case of *Rucker* v. *Wheeler*, 127 U. S., p. 85, was an action brought to recover for services as a broker in negotiating the sale of a mining claim, and the Court, in commenting upon the evidence, said:

" I do not see that this evidence proves, taking all that is said about it by these witnesses, a contract on behalf of the defendant to purchase this property through the plaintiff." And Mr. Justice Harlan, on the appeal, said: "It is no longer an open question that a judge of a court in the United States, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts" (p. 93) * * * "There was no error in this charge. It contained all that need have been said. It fairly submitted to the jury the question as to the existence or non-existence of the agreement upon which the plaintiff relied" (pp. 95-96).

United States v. *Philadelphia and Reading Railroad Company*, 123 U. S., p. 113. This case was an action for internal revenue taxes brought by the Government which objected to the Judge's charge to the jury, wherein the Judge said :

"In other words, while the Court does not desire to control your finding, but submits the question to you, it is of opinion that you should not, under the circumstances, find for the plaintiff" (p. 117). There Mr. Justice Gray in delivering the opinion of the United States Court, said :

"Trial by jury in the Courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination' (p. 114).

The case of the *Vicksburg and Meridian Railroad Company* v. *Putnam*, 118 U. S., p. 545, was an action against a railroad corporation for personal injuries.

The trial Judge commented adversely on the testimony of the defendant's section-master, and also commented upon the age of the broken rails, and there Mr. Justice Gray says:

"In the Courts of the United States, as in those of England, from which our practice was derived, the Judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts" (p. 553).

The case of *Nudd et al.* v. *Burrows*, *Assignee*, 91, U. S., was an action by the assignee of a bankrupt to recover the net proceeds of eleven carloads of hogs. There the Court analyzed and commented upon the testimony, and Mr. Justice Swayne in delivering the opinion of the Court, said:

"We do not think the remarks and suggestions of the learned Judge in this case exceeded the proper license.

They did not go beyond the verge of what has been often sanctioned by this and other courts" (p. 439).

In the case of the *Transportation Line* v. *Hope*, 95 U. S., p. 297, the trial Judge charged the jury:

"If you conclude, after careful consideration of all the evidence, after the instructions we have given you, that the plaintiff is entitled to recover, you will find a verdict in his favor for the value of the barge, as it has been shown by the proofs, and for the net amount of the freights; that is, I believe, $1,800, as shown, aside from the testimony of the plaintiff himself, to have been the value of the barge at the time, and $90, the net amount of the freight, so that these two amounts are the sums which the plaintiff is entitled to recover, if you are satisfied that he is to recover at all" (p. 302).

Sixth Point.

The writ of certiorari prayed for should be granted.

All of which is respectfully submitted,

FRANKLIN BARTLETT,
Of Counsel for Petitioner.

13

Evening Post Job Printing House—N.

1341) 149 U S 787

Supreme Court of the United States.

The Sun Printing and Publishing Association,
Plaintiff in Error,

vs.

Juliette C. Smith,
Defendant in Error.

BRIEF FILED FOR THE DEFENDANT IN ERROR, IN OPPOSITION TO THE APPLICATION OF THE PLAINTIFF IN ERROR FOR A WRIT OF CERTIORARI.

Point I.

This case is one of those in which the jurisdiction of the Circuit Court of Appeals is made final. The jurisdiction of the Circuit Court depended entirely upon the fact that the plaintiff was an alien.

An examination of the record will show this Honorable Court that the action was an ordinary common law action to recover damages for libel, and the only fact in the record giving the Federal Court jurisdiction was the alienage of the plaintiff.

Point II.

If a writ of certiorari is granted in this case, it will have to be in all cases, and the intention of the Act, creating the Circuit Court of Appeals, to make their jurisdiction final will be defeated.

The action is an ordinary action at common law to recover damages for a newspaper libel. The case has been through the trial at nisi prius, the motion for a new trial, and an appeal to the Circuit Court of Appeals, where it has been decided upon the merits. An examination of the opinion of that Court will show not only that every point raised upon appeal by the plaintiff in error was carefully and thoroughly considered, but that they were decided adversely to the plaintiff in error, apparently without hesitation and without any uncertainty on the part of the Judges of the Circuit Court of Appeals as to their correctness.

The questions presented by the plaintiff in error were not unusual or novel. The reason given by the Circuit Court of Appeals in its opinion for its conclusion that the record disclosed enough to confer jurisdiction seemed convincing.

The questions as to the exclusion and admission of evidence are simple and are not new. The questions of law raised in the case by the plaintiff in error are not new, and the disposition of them by the Court of Appeals is but a reiteration of the principles of law applicable to libel, which have existed for generations.

Point III.

We submit that there is nothing in this case which would justify the intervention of this Court. We beg leave, however, to append hereto a copy of the brief submitted to the Circuit Court of Appeals on behalf of the defendant in error, so that if this Court desires a more full exposition of our views it will be before it.

Respectfully submitted.

James D. Fessenden,
Of Counsel.

United States Circuit Court of Appeals 1

FOR THE SECOND CIRCUIT.

THE SUN PRINTING AND PUBLISHING ASSOCIATION,
Plaintiff in Error,

vs.

JULIETTE C. SMITH,
Defendant in Error. 2

BRIEF FOR DEFENDANT IN ERROR.

Point I.

The jurisdictional point made by the plaintiff in error is not well taken.

1st. It is raised too late. This is the first time the jurisdiction has been questioned in any way. 3

At common law, the plaintiff in error lost the right to raise the point by not pleading in abatement and by pleading to the merits, a sufficient allega-

4 tion of alienage appearing on the face of the complaint.

Sheppard *vs.* Graves, 55 U. S., 505.

Following practice of Code of Civil Procedure, the right is lost.

If the alienage of plaintiff does not appear on the face of the complaint, or, in other words, if the allegation, "Plaintiff is and has always been a subject of her 'Majesty, Queen of England,'" is not sufficient, then a demurrer is the only way by which it can be taken.

Code, Section 537:

5 The only pleading on the part of a defendant is a demurrer or answer.

Code, Section 488:

The defendant may demur when the objection that the Court has not jurisdiction appears on the face of the complaint.

In other words, if the complaint as it stands was insufficient, then the objection could have been taken only by demurrer, for by Sections 498 and 499 the only objections which can be taken by answer are those which do not appear on the face of the complaint.

6 The counsel for plaintiff in error is mistaken as to the effect of the answer and the issues raised by it. He argues that the allegation, "She, the plaintiff, " is and has always been an honest, moral and loyal " subject of her Majesty, Victoria, Queen of Eng- " land," is put in issue by the answer.

We claim that the answer does not put in issue any part of the first paragraph of the complaint.

Code Civil Procedure, Section 500:

"The answer *must* contain a general or spe- " cific denial of each material allegation of the " complaint controverted by the defendant or of

"' any knowledge or information sufficient to 7
" form a belief."

The denial in the first paragraph of answer (fol. 21) is not sufficient to meet the requirements of Section 500.

It is not a "general denial of each material allegation, neither is it a specific denial of any one."

Bayliss *vs.* Stimson, 110 New York, 621.

This decision was one which attracted much attention in the profession, for it was in the face of a custom which had prevailed and which has been followed by the plaintiff in error here.

8 The form of denial used in the answer in the case at bar had been accepted as sufficient to put in issue the whole of a paragraph, but the decision in Bayliss *vs.* Stimson made it unsafe.

In Bayliss *vs.* Stimson, the Court of Appeals says:

> "I speak thus doubtingly of the answer, for
> "it is so drawn as to be unintelligible except
> "upon careful comparison with the complaint
> "in order to discover what is denied. In terms
> "it denies nothing, but directs our attention to
> "the whole of the paragraph beginning with
> "the words, 'and the plaintiff in folio 11 to the
> "whole of the paragraph beginning in folio 23
> "with the same words to the last five lines,' &c., 9
> "and avers that as to the truth of such allega-
> "tions as are there found the defendant has
> "neither knowledge nor information sufficient
> "to form a belief. It is thus inartificial and
> "troublesome and not in accordance with any
> "rule of pleading at common law or under the
> "Code. It is however, careless, no doubt easy
> "for the pleader, but the labor of dissection and
> "discovery as to its meaning is thrown upon the
> "opposite counsel and the Court. It belongs to
> "neither. The answer should disclose the defense

10 “ whether it be by denial or new matter without
“ reference to any other pleading; it should be
“ complete in itself and require neither ampli-
“ fication nor patching from fragments of the
“ complaint. The Code means nothing less
“ when it enacts (§ 500) that the answer must
“ contain ‘a denial of each material allegation
“ of the complaint controverted by the defend-
“ ant,” *and what allegations are thus contro-*
“ *verted should appear upon the face of the*
“ *answer.* The plaintiff's attorney should not
“ be required to look beyond that pleading for
“ such information, nor should the Court be re-
“ quired to count lines and measure paragraphs
11 “ to discover the matters put in issue.’ ”

Avery *vs.* N. Y. Central, &c., R. R., 24 State Reporter, 918.

“ It is a fundamental rule that if a party wishes
“ to traverse a fact alleged in a pleading, he must
“ deny the same in plain and unambiguous lan-
“ guage.

Pfandler Co. *vs.* McPherson, 20 State Reporter, 473.

“ Where there is no proper denial of the allega-
12 “ tions of the complaint, facts set forth in the
“ answer as a defense inconsistent with the com-
“ plaint cannot be construed as a denial so as to pre-
“ vent the allegations in the complaint from being
“ taken as true.”

Swinburne *vs.* Stockwell, 58 Howard, 312.

“ A general denial is a denial in gross of all the al-
“ legations of the complaint, and a specific denial is
“ a denial of one or of each allegation separately.”

Dennison *vs.* Dennison, 9-How., 246.

Therefore, the effect of the decisions cited is, that unless a general denial is interposed, no denial of a part of a complaint is good unless the part intended to be denied is denied, in specie, or *so that what is denied appears upon inspection of the answer without the complaint*, so that plaintiff's attorney does not have to look to the complaint or compare it with the answer. He cannot be compelled to look at the answer and complaint together or to compare them. 13

The necessary consequence of this is that unless the answer is a general denial, a denial in gross of the whole complaint, the *part* denied must be denied in *haec verba*, from which it follows that in order for plaintiff in error to have admitted the residence and denied the rest of the allegations in the first paragraph of the complaint, it was necessary for it to deny as follows: 14

" The defendant admits that plaintiff resides at " Toronto, but the defendant denies that the plain-" tiff is and always has been an honest, moral, &c., " subject of her Majesty, &c."

If the plaintiff in error had so done, the attorneys for defendant in error could have told by examining the answer alone just what was denied, and would not have been compelled to take up the complaint to see what were " the other allegations set forth in the first paragraph of the complaint."

This rule is now followed by pleaders familiar with the decision of Bayliss *vs.* Stimson, *supra.* Either a general denial must be put in or an answer admitting some allegations but denying the others *in the language in which they are set out.* 15

The plaintiff in error failed to do this and did not make a specific denial of the allegation that the plaintiff " is and was a subject, &c.," and inasmuch as there was no proper denial of that allegation, it must, following the rule of Swinburne *vs.* Stockwell, *supra,* and the logic of the situation be deemed to be taken as true.

The whole of paragraph I. of the complaint must be deemed then as admitted on the record. The

16 New York cases cited in the opinion of Justice Gray set out *in extenso* in our opponent's brief, Sweet *vs.* Tuttle, 14 N. Y., 465, and Gardner *vs.* Clark, 21 N. Y., 399, were cases construing the Old Code. They were decided in 1857 and 1860. In Sweet *vs.* Tuttle there was a general denial and all they seemed to hold is that a defense in abatment may be joined with one in bar. We cannot see that they have any bearing on this case.

It must be deemed that there is no denial of the allegation that plaintiff is and has always been a subject of her Majesty, the Queen of England, and as such has resided for a long time, and now resides in Toronto, Canada.

17 *The allegation "plaintiff is and always has been a subject of her Majesty, the Queen of England, and as such now resides in Canada," is a sufficient allegation of alienage to confer jurisdiction on the Court.*

The statement that plaintiff "is and always has been" a subject of the Queen of England, is a statement that she has never been anything else. There has been no time in her life when she was not a subject. Therefore she must have been *born* a subject.

The inference is conclusive and exclusive. The allegation is equivalent to an allegation that plaintiff was born a subject of the Queen of England. It is not an argumentative statement. It is an absolute statement of the fact. There is no argument to the
18 contrary. The allegation is fully as good for the the purpose as an allegation that plaintiff was born a subject of the Queen and has ever since so remained.

In fact it is better pleading to say plaintiff was "born in the dominion of the Queen," than to say plaintiff is an "alien," because the latter is a conclusion of law.

To allege plaintiff is a citizen of the State of Georgia is not so good in pleading as to say plaintiff was born in Georgia and has always lived

there. The former is a conclusion of law resulting 19
from the facts contained in the latter.

The uncontroverted allegation of the complaint, therefore, is in effect an allegation that plaintiff was born and has ever since continued to be a subject of the Queen of England.

What follows if this is not deemed sufficient as an allegation that plaintiff was born and has always been an alien?

It follows that proof of the common law of England that a subject of the Queen of England is a person born within her dominion, would have to be placed before an American court. A necessity which does not exist.

The Court will take judicial notice that a person 20
to be born a subject of the Queen of England must be born in her dominions either actually or constructively, as in the case of the child of an ambassador. Hence we say that a record which contains in the complaint an allegation that plaintiff is and has always been a subject of the Queen of England, uncontroverted by the answer, and, of necessity, taken to be true, discloses enough to clothe the Circuit Court with jurisdiction.

There is nothing to the contrary in the cases cited by our opponent or found in the reports.

There is no case going so far as to say that the omission of the word citizen is fatal, nothwithstanding whatever else the complaint may contain.

21 A number of cases were decided before the practice under the State Code was made the rule of decision by statute.

Brown *vs.* Keene, 33 U. S., 8.

The petition said "citizen or resident," leaving a doubt as to which he was. It was not positive as to the citizenship, and the Court only said that inasmuch as the fact on which jurisdiction depended must appear positively, the allegation was not good. Plaintiff might have been a citizen, or he might have been a resident.

22 The answer, too, in the case put the requisite citizenship of the parties in issue.

Bingham *vs.* Cabot, 3 Dall., 382.

"Francis Cabot, of Boston," not sufficient.

Wood *vs.* Wagnon, 2 Cranch, 9.

"James Wood, of the State of Georgia," not sufficient.

Abercrombie *vs.* Dupuis, 1 Cranch, 343.

"The petitioners reside without the limits of the district of Georgia. * * * The defendant is called Charles Abercrombie, Esq., of the district of
23 Georgia."

The Court followed Bingham *vs.* Cabot, and held the averment insufficient to show jurisdiction, although the Chief Justice said he did not know what his opinion might be if the question was a new one.

These are the leading decisions among the early cases made when technical rules and a technical temperament prevailed, and even they do not lay down any cast-iron rule that the word citizen must be used to confer jurisdiction. They are all cases where the defect was either a positive failure to allege citizenship or an allegation leading to two or more conclusions about it.

24 There is nothing in them opposed to the proposition that an allegation which points to the conclusion of alienage so plainly and directly as to exclude all other conclusions, is not sufficient to confer jurisdiction.

The recent cases are not irreconcilable with this principle.

Continental Ins. Co., *vs.* Rhoades, 119 U. S., 237.

It was conceded that the citizenship of plaintiff did not appear. The plaintiff, suing as adminis-

trator, alleged only the citizenship of her intestate, 25
and the Court held that the jurisdiction depended on citizenship of the plaintiff and not of her intestate, and hence the record was defective.

This case points, too, towards the proposition we contend for, for the Chief Justice enunciates the principle to be "the facts on which the jurisdiction rest must, *in some form*, appear on the face of the "record."

A. and F. Railroad Co. *v.* Western Railway Co. of Alabama, Part 20 U. S. App., semi-monthly, Nov. 15, 1892.

Fifth Circuit:

> "Corporation chartered under the laws of 26
> Georgia and resident of the Southern District of Georgia."

Metcalf *vs.* Watertown, 128 U. S., 586, only goes so far as to say:

"It is fatal to the jurisdiction that it is consistent "with the record that the parties (who should be "citizens of another State) are citizens of the same "State with defendant."

And this is the best statement of the rule we have found:

If from the record in the case at bar the Court 27
could say that plaintiff was a citizen of the State of New York, then the record does not show jurisdiction.

But no Court could take the undenied allegation that "plaintiff is and always has been a subject of "the Queen of England, and as such has resided for "a long time, and now resides in Toronto, &c.," and find as a fact that plaintiff was a citizen of the State of New York.

The pleadings alone then disclose, irrespective of the testimony in the case, the alienage of the plaintiff sufficiently to warrant the Court in taking juris-

28 diction without contravening the decisions or the principles involved.

But whether the allegations of the first paragraph of the complaint are deemed to be controverted or uncontroverted by the answer, upon going to the *evidence* enough appears to give the Court jurisdiction.

The plaintiff, at folio 45, testified that she had resided in Toronto ever since she was married, nearly six years ago—that John C. Smith *is* her husband.

John Christopher Smith testified (fol. 59): I reside in Toronto. *I have resided there all my life.* Juliette C. Smith *is* my wife.

This testimony sufficiently shows the alienage or
29 foreign citizenship of the plaintiff, because her husband's alienage is clearly shown, and the citizenship of the wife at common law merges in that of the husband. If it had been desired on the trial to prove as a fact that John C. Smith was an alien and a citizen of Toronto, Canada, no other testimony would have been required than he gave.

He testified that he had resided in Toronto all his life. Necessarily then he was *born* there and had always lived there.

The Court did not need proof of the law that a person born in Canada who has lived there all his life is an alien, or that a person born an alien can not change his allegiance or citizenship without a
30 change of residence. That there had been no change of residence clearly appeared. Therefore, it stands proven in the case that the husband of plaintiff was, when the suit was brought, as at all other times, an alien, citizen of Canada, a foreign country.

This was ample and legal proof of the foreign citizenship of the [illegible] *wife ~~of~~ the plaintiff*, for by the common law of England and of the United States, upon the marriage the husband and wife become one person. Upon her is devolved his citizenship and his domicile.

Nothing appears in the record to contravene this, and the foreign citizenship of the plaintiff was proved so fully that it was impossible for the Court to say that the plaintiff was a citizen of the State of New York. 31

This point of jurisdiction, taken by a party after judgment, and clearly an afterthought, does not appeal to the favor of the Court, and should not.

The United States Circuit Court of Appeals for the Eighth Circuit has so stated.

Preteca *vs.* Maxwell Land Grant Co., 50 Fed., Rep. 674.

Caldwell, Circuit Judge:

> " In the courts of the United States, the objection (jurisdiction) when made for the first time in the appellate Court should be looked upon with disfavor. * * * We think the facts alleged in the bill make the case one of equitable cognizance, but if we entertained doubts of this point, we would because of the fact that the objection was not made in the Court below resolve them in favor of the jurisdiction." 32

Upon a motion to dismiss for want of jurisdiction, every legal intendment from the facts must be drawn in favor of the plaintiff.

De Bussiere *v.* Holliday, 4 Abb. New Cases, 116. 33

Point II.

The assignments of error interposed on behalf of the plaintiff in error can be thus classified.

1st. Exception to the admission and exclusion of evidence.

34 2d. Exceptions to refusals to charge and to portions of the charge.

3d. An assignment of error in that the verdict was excessive.

I.

The first, second and third assignments of error call in question the correctness of the Court below in permitting the plaintiff to testify in substance that her journey to New York with Mr. Rutherford had been arranged between him and her husband. The witness speaks of her knowledge; the proper 35 remedy for the defendant was by cross-examination, and there was no error committed by the Court; but this evidence, correctly or erroneously, admitted by the Court becomes of no importance when taken in connection with the testimony of John C. Smith, at folio 60, who there testifies, without objection, to exactly the same fact and no attempt was made by the defendant in the case to dispute the fact.

No error is pointed out by the fourth assignment, for the evidence objected to was direct proof of an allegation of the complaint, that the article was read by many people.

Under the fourth assignment of error, attention is called to the action of the Court in permitting Mr. Smith to testify as to the age of certain people. 36 Taken in connection with testimony in the case, in several places that the only other Smiths known as large merchants in Toronto were Frank Smith and A. M. Smith, it was quite proper to permit evidence of such facts as would satisfy the jury that the Mrs. Smith referred to in the article could not have been either of those two. The identity of the plaintiff with the lady mentioned in the article was denied, and it was competent and necessary for the plaintiff to establish it by proving such facts as would naturally and properly lead a juryman to say that the wives of the two Smiths, Frank and A. M., could

not have been referred to in the article, and there is 37
certainly no error in permitting a man to testify as to apparent age where there is such a wide diversity of age as appeared in this case. It might be different in a case where the issue was a person's actual age within a few years. It would then be very questionable to permit the age to be shown by no other evidence than some one's opinion of it, but where a man of thirty is charged with eloping with a woman, with whom his intimacy has been freely spoken of, there is certainly no error in permitting a man to testify that two other women whose existence might involve the identity in doubt, were of such advanced years as to render the application of
the article to them improbable and unlikely. It is 38
a matter of experience that age can be very nearly guessed at, and where the question of age is not vital to the case, it is no error to permit a witness to testify as to what he should judge a persons age to be.

There was no error committed in permitting Mr. Smith to testify as he did in answer to the question, "How many merchants of the name of Smith are there in the City of Toronto who do a very large business?" The testimony was clearly material on this question of identity, and Mr. Bartlett's proper remedy would have been to ask permission at that point to cross-examine and show that no sufficient
knowledge existed, or to have left it to his cross- 39
examination to disclose.

This fourth assignment of error criticises the Court below in sustaining the objection by the plaintiff to an inquiry made of Mr. Smith on his cross-examination in these words, "Q. Have you brought any suit "against any other paper?" This question was clearly immaterial and properly excluded. It was no concern of the jury in this case whether Mr. Smith had sued any other papers or not. He was not the plaintiff in the action. It was his wife who was the plaintiff, and whether Mr. Smith had sued other papers or Mrs. Smith had sued other papers

40 was immaterial. They both had a right to sue any or all of the papers, and the purpose of the question was to bring out the fact, if it existed, that for this, or a similar libel published in other newspapers, suits had been brought, and Mr. Bartlett's purpose undoubtedly was to ask the jury to take that fact into consideration and reduce their verdict in consideration of it. To use a bookkeeping expression, he intended to endeavor to have the jury, in estimating their verdict, credit his client in the account with what might have been recovered from other papers, or what they thought might be; but this action was brought for a wrong committed by this defendant, and whatever Mr. Smith had chosen to 41 do with respect to other possible offenders had no bearing upon this case and was very properly excluded from it, and the same argument applies with equal force to the exception taken on behalf of the plaintiff in error to the exclusion of the question, Had Mrs. Smith brought an action against Mr. Cronin for libel?

This assignment also points out an alleged error committed below in excluding this question asked of Mr. Smith on his cross-examination, "Q. Do you "know that he (Cronin) wrote the article or the "dispatch which gave rise to this publication?"

The defendant was not prejudiced by the exclusion of this question, because it was proved conclu- 42 sively by defendant's own witnesses, and the plaintiff did not controvert it, that a man in Toronto named Cronin did write the dispatch which gave rise to the publication. The only tendency of the question put to Mr. Smith was to prove the fact, and its exclusion at this point did not injure the defendant, because when the case went to the jury the defendant had the full benefit of that fact abundantly proven by its witnesses and not controverted by the plaintiff.

By the fifth assignment of error, the plaintiff in error calls attention to the action of the Court in permitting Metcalf Thwaite, a witness for the plaintiff, to testify, over objection, that after reading the article he heard comments publicly made in the City of Toronto in relation to it; that he should say he heard it from one hundred people; that he knew to whom the article related, because Mr. Rutherford's name was connected with it, and he knew that he and J. C. Smith were intimate friends, and he knew that it was generally talked off, and he never doubted that its was Mrs. J. C. Smith. 43

It was proper to allow him to testify that he heard comments publicly made by one hundred people, because that testimony is in direct support of the allegation contained in paragraph V. of the complaint at folio 16, and of the allegation that the matter was 44 read by many people. In support of the allegation that the plaintiff was unjustly degraded in the opinion of many worthy people and otherwise injured, it was competent for the plaintiff to show something of the extent to which the article was disseminated among the inhabitants of her own city, and that was the sole tendency of the testimony. The witness was then asked if it was generally understood in Toronto that the lady referred to in the article was Mrs. Juliette C. Smith, and objection being made, he did not answer the question, but the Court permitted him, over objection, to say that he knew to whom the article related when he read it, and why. This was not error. The predominant opinion is 45 that in actions of libel the application of the matter to the plaintiff, where the plaintiff is not named, may be shown by the testimony of people, that they, at the time, understood the plaintiff to be meant.

Some authorities in support of that proposition are:

44 California, 641.
2 Wharton's Evidence, 975.
2 Starkie on Slander, 321.
13 American Reports, 169.

46 There are some cases in the State of New York which have a contrary tendency, but they are not in line with this case. These cases are:

4 Wendell, 320.
5 Johnson, 211.
7 Wendell, 560.

And we refer the learned Court to the opinion of the Judge below in support of his denial of the defendant's motion for a new trial. The opinion is printed in the record, and we refer to that portion of it between folio 183 and folio 188.

But the admission of this testimony and that which is called to attention by assignment sixth, cor-
47 rectly or incorrectly admitted, had no substantial bearing upon the case, and has not prejudiced the plaintiff in error. This testimony was only elicited, and its only tendency was to support and establish the identity of the plaintiff with the person referred to in the article itself, and the case contains such an abundance of competent proof as to the indentity, irrespective of the evidence criticised, that even if the evidence had been excluded from the case, the identity would have been fully and perfectly established. A number of things were testified to by numerous witnesses and clearly shown. Among them, that the plaintiff was in New York with Mr. Rutherford at the time that the libel was pub-
48 lished, and she had come with him from Toronto. That her husband was a large merchant in Toronto; that there were only two other large merchants in Toronto by the name of Smith and they were old men, and their wives were elderly women. Pipon testified that there was no other Mrs. Smith in Toronto with whom Mr. Rutherford was known to be on terms of any intimacy whatever. That the plaintiff and her husband, John C. Smith, had been generally known, in Toronto, to be intimate friends and companions of Rutherford. All these things were admitted and proven without objection, and were amply sufficient

to establish the identity, and therefore it must appear to the Court that Mr. Thwaite's and Mr. Bradburn's testimony in this behalf had no effect whatever upon the result of the case. 49

The same argument applies with equal force to the matters mentioned in the seventh assignment of error, and not only that, but the matters testified to by Mr. Pipon were matters of competent and direct evidence upon the question of identity.

The eighth assignment of error shows no error to have been committed by the Court below to permit Andrew Smith to testify that he had read the article, and was in line with proper proof of the allegation of the complaint that the article was read by many people, one of whom he was. 50

Coming to the ninth assignment of error, we find something different. We find that error is claimed to have been committed by the trial Judge when he prevented the defendant from showing by the testimony of an actress something, we know not what, that the plaintiff was doing in New York several years prior in time, when she was here studying with the actress, but there can be no doubt in the mind of any one who reads the testimony of Miss Le Clare, that the question excluded was intended by Mr. Bartlett to elicit something derogatory to the character or history of the plaintiff, and we think that this Court will agree with the learned trial Judge, who states in his opinion on the motion for a 51 new trial that the defendant had estopped itself upon the record of the case from such a line of defense. By reference to page 30 of the record, it will be seen that the defendant kept out of the case certain testimony offered by the plaintiff by stating in open Court that they (the defendant) make no attack on the character, social character or position of this lady. Unquestionably having made that concession and by means of it having excluded the testimony of the plaintiff, the defendant was properly prevented from a line of conduct inconsistent with it, and from eliciting any evidence derogatory to the plaintiff.

52

II.

The tenth assignment of error calls attention to certain matters actually charged by the Court which are claimed to have been erroneous. We think that the learned trial Judge was fully within the privileges of a Federal Judge in this charge. To justify the charge, as made, it is not even necessary to satisfy the Court that Federal Judges enjoy a very broad latitude in charging the jury, but the rules laid down in four cases:

Simmons *vs.* The United States. 142 U. S., 148.
53 Vicksburgh & Meridan R. R. *vs.* Putnam, 118 U. S., 545.
The United States *vs.* The Philadelphia R. R., 123 U. S., 113.
Lovejoy *vs.* The United States, 128 U. S., 171,

confer a discretion and a privilege so broad that the language of the Court in charging could have been much more adverse to the defendant than it was, and yet have been far within the rule. In Lovejoy *vs.* The United States, it is held that a Judge of an United States court may express his opinion upon the facts to the jury, and it is the same in the case of the United States *vs.* The Philadelphia Railroad.
54 in the case of the Vicksburgh and Meridian R. R. Co. *vs.* Putnam, the courts say that a "Judge in submitting a case to a jury may, at his " discretion, whenever he thinks it is necessary, to " assist them in arriving at a just conclusion, com" ment upon the evidence and call their attention to " parts of it which he thinks important, and ex" press his opinion upon the facts and the expression " of such an opinion, when no rule of law is incor" rectly stated, and all matters of fact are ultimately " submitted to the discretion of a jury, cannot be " reviewed upon a writ of error." In the Simmons case, *supra*, the same think is held.

The language of the Court complained of in subdivisions C, D, E, F and G of the tenth assignment of error was, under all the circumstances of the case, moderate, true and proper. Every word of it was true. The characterization of it was fair, and it affords no ground for disturbing this verdict. The charge complained of in Subdivision A was a correct exposition of the law of libel. It is elementary law that the law does imply malice when the publication is of matter libelous on its face, and throws the burden upon the defendant of overcoming the implication. 55

Subdivision H criticises this language: "If you "think that the defendant was guilty of reprehensible negligence in publishing the article without "further attempts to verify its truth, then you are "justified in giving such a reasonable sum as damages as shall be an example to deter against similar future negligence." 56

Since this charge was delivered, this very Court has expressed its approval of the principle of law embodied in it.

Morning Journal Association *v.* Rutherford, 2d Circuit, July, 1892 (not reported).

and an abundance of other cases maintain the principle.

Philadelphia R. R. *vs.* Quigley, 21 Howard, 202. 57

Bergman *vs.* Jones, 94 N. Y., 52.

Holmes *vs.* Jones, 121 N. Y., 467.

Taylor *vs.* Church, 8 N. Y., 452.

Samuels *vs.* The Evening Mail Association, 75 N. Y., 604.

Hartman *vs.* The Morning Journal Association, N. Y. Law Journal, June 8, 1892.

The Court, too, was as solicitious as the defendant could expect, for the protection of the defendant, 58 when he said at folio 172, that the only rule which he could give them was that the amount should be reasonable and just. Where he stated that there was no evidence that the defendant company was inspired by personal ill-will, and that the plaintiff was not entitled for punitive damages as a punishment for any personal hostility. To complain of this charge seems to us to be almost ungrateful.

The eleventh, twelfth, fourteenth and fifteenth assignments of error refer to refusals to charge, but the language contained in those requests was substantially embodied in the charge. The second request was charged at folio 170; the third request was charged at folio 174; the fifth request was sub-
59 stantially charged at folio 171, and the eighth request was substantially charged at folio 174.

No error was committed in refusing to charge the fourth of the defendant's requests. It called for a false inference. It does not follow that because the persons who were shown to have read the libel were intimate friends of of the plaintiff, that no other persons did read it.

The defendant had no right to the charge requested by the tenth request. It was not a matter of law, and it was a matter entirely for the jury to say, and we do not think that even if it had been charged, it would have affected the result. The idea covered by the tenth request to charge, and by the
60 eleventh are not matters of law for a court to charge. They are matters for summing up, and if a judge is obliged to charge such requests as the tenth and the eleventh, there is nothing to prevent counsel from throwing upon the Judge pretty much the whole burden of summing up the case.

III.

The only other question in the case is the question of the propriety of the verdict. The plaintiff in error claims that it is excessive enough to warrant its being set aside upon a writ of error. When all the circumstances of this case are considered, it

ought to appear to the Court that the verdict, instead 61
of being one to be set aside, has much to commend
it. Some cases may be discovered by the
industry of the counsel for plaintiff in error, in
which verdicts have been set aside in actions of tort.
There is no class of cases, however, in which the
amount of damages is so peculiarly within the
province of the jury as cases of libel. There is no
mathematical basis, and any verdict of a jury in a
libel case must stand unless it is so atrocious or
shocking that the appellate Court is convinced beyond
a doubt by its atrocious character that the jury
was actuated by passion, partiality, prejudice or
corruption, or a complete failure to understand the
theory of the case or some influence entirely out of 62
place in the jury box. We have no apprehension
that such will seem to have been the case here. The
verdict, while severe, should have been severe. A
verdict which was not severe in such a case would
not have any elements of punishment in it which
the case deserved. While the verdict may have
been more than the Court sitting as a juryman
would have given, yet there is no gross excess sufficient
to warrant disturbing it. The article was
cruel, derogatory and base. It plainly, without
equivocation, charged a base thing. It purported on
its face to refer, as in fact it did refer, as the testimony
showed, to persons of wealth, high position
and thorough respectability. The lady accused of 63
this flagrant thing was shown to the jury to be an
honored wife, the mother of three children. As the
answer of the newspaper admitted, the paper had
an enormous circulation. The natural and inevitable
result followed. The scandal penetrated to her
native city and became the talk of the town, and no
mind can picture or fully realize the thousand
avenues through which it went, carrying its burden
of shame and of damage to an honest woman's
reputation; and this paper, great and powerful as it
was, published the matter with such a proven absence
of investigation or attempt at verification that

64 the jury was by the law warranted in compensating not only for the suffering and injury, but in giving as damages a sum of money suitable to punish and check the defendant from a repetition of the offense. A large sum of money was necessary to do this. A small sum of money would have been putting a premium upon the publication of such matter. It further appeared to the jury by the testimony of the defendant's witness, Mr. Brisbane, at folios 135-6, that it is the course and policy of the defendant to publish such matter without independent investigation. This was not an isolated case which had happened through an inadvertence, but it was a thing which necessarily happened from the customary
65 practice of the defendant in putting such matter into its columns with an indifference and recklessness which is bound to result similarly many times. These considerations are but a few of the many which could be suggested to the Court as necessarily operating in the mind of the jury to bring about this result and to make it the result of a reasonable, fair, but just deliberation. It is not the province of counsel upon an appeal to a court of law to sum up the case, and we therefore close this part of the argument with an expression of our confidence that when all of the circumstances of this case are considered, the Court will fail to believe that the jury were led to this result by any influence which
66 was improper or which blinded their judgment or clouded their reason.

HARRIMAN & FESSENDEN,
For Defendant in Error.